AMERICAN BAR ASSOCIATION
JOVRNAL

VOL. IX MARCH, 1923 NO. 3

CVRRENT EVENTS

The Minneapolis Meeting

MR. JUSTICE PIERCE BUTLER, of the United States Supreme Court, has been invited to deliver an address at the annual meeting of the American Bar Association in Minneapolis, and has accepted the invitation. This is the first definite item to be made public about the program for the coming meeting, which the Committee expects to make one of the most interesting in the entire history of the Association. The subject of Justice Butler's address will be announced later.

In connection with this meeting, attention is called to a mistake in the announcement made in the last issue of the JOURNAL. It was inadvertently stated that Mr. Cordenio A. Severance, former President of the Association, and now a member of its Executive Committee, had invited the "Association" to meet at his home near St. Paul on Tuesday preceding the meeting. The invitation was extended to the Executive Committee alone, which always holds a meeting on the afternoon preceding the opening of the meeting of the Association. This is an important Executive Committee conference, and usually takes several hours. When the Executive Committee at its recent meeting at Hot Springs adjourned to meet at 2:30 p. m., Tuesday, August 28, in Minneapolis, Mr. Severance suggested that it meet at his home at 1:00 p. m., instead of at the hotel at the hour mentioned.

Our New U. S. Supreme Court Justice

CHIEF JUSTICE TAFT administered the judicial oath on February 19 to Hon. Edward T. Sanford, of Tennessee, who thereupon took his seat as Associate Justice of the United States Supreme Court. Since Judge Sanford was named for this important position by President Harding, there have been numerous commendations in the press on his selection. Judge Sanford is a native of Tennessee, having been born in Knoxville, July 23, 1865. He received his early education in Knoxville, graduating from the University of Tennessee in 1883, at the age of eighteen. He then went to Harvard and received there the degrees of M. A. and L. L. B. He was admitted to the bar in 1888 in his native state, and engaged in the practice of his profession at Knoxville. From 1898 to 1907 he delivered lectures at the law school of the University of Tennessee in that city. In 1907 President Roosevelt named him assistant Attorney-General, and this was followed by his appointment to the Federal District Bench for East and Middle Tennessee, in 1908. The quality of his service in that important position is sufficiently evidenced by his nomination and confirmation for membership in the highest tribunal of the nation. Judge Sanford is a man of varied interests. He is trustee of the University of Tennessee, one of the charter members of the board of trustees of the George Peabody College for Teachers, and has held high position in the Tennessee Bar Association and the American Bar Association. He received the degree of L. L. D. from the University of Cincinnati in 1908.

Court's Right to Dismiss With Prejudice

THE inherent common law right of the court to control pleadings and the conduct of litigants, and even, when the circumstances warrant, to go to the length of dismissing an action with prejudice without a hearing on the merits when counsel repeatedly fail to conform to the rules of court, was asserted in a clear-cut and very interesting opinion of the Supreme Court of Nebraska in the case of Ferson, et al. vs. Armour and Company, Swift & Company, and forty-three other defendant concerns of national prominence. The suit was instituted in 1919 to recover $120,000,000 damages on account of

There is an apparent discrepancy

The pages are either missing or th

The filming is recorded as the boo

ancy at this point.

or the pagination is incorrect.

e book is found in the collections.

alleged conspiracy to deprive the plaintiffs of the use of certain patents based on formulae and receipts for the making of pork and bean biscuit. The opinion by Justice Rose states that the first petition filed below covered approximately four hundred pages of matter "containing, among other things, inflammatory language, conclusions of fact and law, redundant allegations, unnecessary repetitions, scandal, private chat, personal episodes, evidence, criminal charges and other extraneous matters having no legitimate relation to the stating of a cause of action for damages." The district court struck the first petition from the files. A shorter petition was afterwards filed, but it also was stricken from the record because it did not conform to the statutory rule requiring a statement of the facts constituting the cause of action in ordinary and concise language and without repetition. A third petition, containing generally the improper infirmities of both the first and second petitions, was striken from the record, and the same fate, on the same ground, befell a fourth petition which was filed after further warning from the court. In addition, the action was dismissed with prejudice and from this appeal was taken. Justice Rose answered the question, as to whether the trial court had erred, emhatically in the negative. Among other statements in this interesting opinion, Justice Rose declared that "judicial power to dismiss an action without prejudice for failure of plaintiffs to comply with rules of pleading and orders relating thereto is recognized by statute. Comp. St. 1922, Sec. 8598. A court of general jurisdiction has also power, in administering justice as a department of government, to protect itself, litigants and the public from vexatious proceedings by dismissing with prejudice suits instituted by plaintiffs who repeatedly violate the rules of pleading and the orders relating thereto, after having had a full opportunity to present litigable controversies in proper form. This power, however, should be sparingly exercised. Otherwise innocent suitors may suffer from the mistakes or the contumacy of attorneys whom the court itself licensed to practice law. The present case, however, is not one wherein the clients are ignorant of the nature and the contents of the petition. Much of the scandal and other objectionable matter condemned could only have been collected and prepared by painstaking care and industry on the part of plaintiffs themselves. Under the circumstances of this particular case, the trial court did not err in dismissing the proceeding with prejudice."

Record of Philadelphia Legal Aid Bureau

THE annual report of the Bureau of Legal Aid of Philadelphia shows the remarkable record of having recovered more than two million dollars for persons who have been defrauded, and of having given legal advice to more than twelve thousand persons in distress during 1922. The Bureau is said now to be the largest agency of its kind in the United States, and possibly in the world. Mr. Romain C. Hasrick, Chief of the organization, states that it has more than justified itself in the relief of thousands of families who were too poor to go to law. The policy of the Bureau has been to discourage litigation and to resort to conciliation wherever possible; and this had been so successful that adjustments have been arranged in all but a small percentage of the cases. This has resulted in saving the time of the courts of Philadelphia, and also the money of the taxpayers, as the cost of a civil or criminal case before a jury there averages between a hundred and fifty and two hundred dollars. More than one-sixth of all the cases handled in 1922 arose from increases in rent. The City of Philadelphia rendered legal assistance through the Bureau during the past year for $2.04 per case, an average below that prevailing throughout the country.

Combatting Misdemeanors With Felonies

DISTRICT FEDERAL JUDGE GEORGE WHITFIELD JACK, in his recent charge to the Federal Grand Jury at Alexandria, Louisiana, in the latter part of January, paid particular attention to the action of mobs in Morehouse Parish. He declared that, although the crimes committed in that district were cognizable only by the state courts, yet the Federal court must view with grave apprehension acts which imperil the force of all authority and strike at the very foundation of the government itself. "Let no man," he said, among other things in this connection, "be deceived by the false promise that lawlessness may be successfully combatted by greater lawlessness; that misdemeanors may be stopped by the commission of felonies, that bootlegging may be broken up by the perpetration of murder. It is courting disaster to fight the devil with fire; it is worse than criminal to oppose crime with crime, and such a course must inevitably lead to an orgy of irresponsible men drunk with illegal power, to a reign of terror, culminating in anarchy. Far better that the bootlegger go unwhipped of justice and the prohibition statute become a dead letter, than that there be tolerated an attempted enforcement of the law by the mob. When unchallenged hooded men sit in secret judgment and in the dark forests execute their arbitrary decrees; when such self-constituted authorities assume the right to decree and acquire the power to enforce an order of banishment or a sentence of death, then palsied must fall the arm of the court and well may the crier call, 'God save the state.'"

AMERICAN LAW INSTITUTE IS ORGANIZED

First Step in a Great Constructive Movement to Restate and Simplify the Law, and Thus Rid Nation of the Burden of Legal Complexity and Uncertainty, Is Taken at Notable Meeting at Washington Attended by Leading Representatives of Bench, Bar and Law Schools—Elihu H. Root Presides and Explains Purpose of Gathering

THE American Law Institute was organized at Washington, on February 23, at one of the most notable meetings in the history of the profession. Invitations had been sent by the Committee on the Establishment of a Permanent Organization for the Improvement of the Law to a list of outstanding figures of Bench and Bar and Law Schools to meet and adopt a plan for dealing with the growing uncertainty and complexity of the law. To each one so invited there had also been sent a copy of a carefully prepared preliminary report, the labor of nearly a year, on the undertaking to be considered. The response testified to the feeling of the profession that the occasion was no ordinary one, and that the opportunity offered for rendering a great public service was unique. The character of the men who formed the Institute, representative of the best that the profession can furnish, is sufficient to launch the new movement under the most satisfactory auspices and to commend it to the intelligent consideration and approval of the public.

The objects of this organization, as stated in the by-laws, "shall be to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." In other words, it aims at a restatement of the law which will be so capably done as to commend itself as authoritative to the courts of the country. In order better to discharge its functions the Institute has been incorporated under the laws of the District of Columbia, for perpetual existence—thus giving that assurance of permanency necessary not only to the work, but also to the creation of public confidence in its character. At the Washington meeting the council, which is to be the governing body, was chosen, by-laws were adopted after a careful consideration of certain important features, and the choice of the subjects which the Institute will take up first for simplification and restatement was practically left to the council there selected. The report of the Committee which formed the basis for the discussion on this point at the meeting proposed Conflict of Laws, Corporation and Torts.

The morning and afternoon sessions in Continental Memorial Hall were for the most part extremely business-like in character. There was discussion, of course, but it was not difficult to reach a conclusion on the points considered. Concededly the most significant thing of all was the spirit that pervaded the meeting—a spirit which caused Chairman Root, in closing the proceedings later in the afternoon, to declare that he was satisfied that "there has been no previous period in the history of the development of American institutions when such a meeting as this, held in such a spirit as has been expressed here, would have been possible." A record of detailed proceedings can hardly do justice to the inspiration and appeal which there was in the idea that an undertaking that had floated so long in the minds of thoughtful men as a sort of unrealizable ideal, was at last taking form and substance and entering on its hopeful beginnings; that a practical plan was being adopted and a definite line of action determined; and—what was equally important for ultimate success—that a start had been made toward getting behind an undertaking in which the country is so profoundly interested the force of an enlightened public opinion.

Hon. Elihu Root was chosen temporary, and afterward permanent, chairman of the meeting, on motion of Hon. Cordenio A. Severance. He began with the statement that it was an inspiring and cheerful spectacle upon which he gazed, the spectacle of men eminent in the great profession of the law who had come from high station and leadership in practice in the various courts of our country from all parts of the Union, to participate in a conference upon the improvement of the law. He continued:

"I have been requested by the Committee to make a brief statement in explanation of the proceedings which bring us to the point where we are now. Most of you know that for many years we have been talking in the American Bar Association and in many State Bar Associations about the increasing complexity and confusion of the substantive law which is applied in all our states and in the federal courts. We have been talking about it. We have had committees appointed, but nothing has been done; and about a year ago a number of gentlemen interested in the subject began to consult as to whether something could not be done, and how it could be done. It was apparent that the confusion, the uncertainty, was growing worse from year to year. It was apparent that the vast multitude of decisions which our practitioners are obliged to consult was reaching a magnitude which made it impossible in ordinary practice to consult them. It was apparent that whatever authority might be found for one view of the law upon any topic, other authorities could be found for a different view upon the same topic. The great number of books, the enormous amount of litigation, the struggles of the courts to avoid too strict application of the rule of stare decisis, the fact that the law had become so vast and complicated that the conditions of ordinary practice and ordinary judicial duty made it impossible to make adequate examinations—all these had tended to create a situation where the law was becoming guesswork.

"You will find in the paper which has been distributed the statement that a count made in 1917 showed 175,000 pages of reported decisions in the United States, as against 7,000 in Britain. Three

years before that I had a count made in the Library of Congress, the result of which I have often stated. It showed that during the five years preceding 1914 over 62,000 statutes had been passed and included in the printed volumes of laws in the United States, and during that same five years over 65,000 decisions of courts of last resort had been delivered and included in the printed volumes of reports. And still it goes on.

"It was evident that the time would presently come, unless something were done, when courts would be forced practically to decide cases not upon authority but upon the impression of the moment, and that we should ultimately come to the law of the Turkish Cadi, where a good man decides under good impulses and a bad man decides under bad impulses, as the case may be; and that our law, as a system, would have sunk below the horizon, and the basis of our institutions would have disappeared.

"The result of the conference was, first, to consider an attempt to secure a great meeting of representatives of the Bar from all over the country, and then the suggestion was made that the meeting would have nothing to do of practical effect, because they would have nothing to work on, and that they would be driven to appoint a committee to study the subject and to report upon it at a further meeting. It was also suggested that for such purpose, merely to come together and appoint a committee, it would be impossible to secure attendance from all parts of the country of the men who ought to be in such a meeting; and accordingly it was determined to constitute such a committee as everybody knew such a meeting would constitute, and let them make a thorough, exhaustive study of the subject, How can the work of restating in clear and simple terms and in authentic form the substantive law be performed?

"Accordingly, such a committee was got together. They secured funds, they employed competent and experienced assistants, and for nearly a year the work has been conducted, and the result of the work is this report which we make to this meeting as if we had been appointed by you to make this study and report, asking you to receive it and to consider it and act upon it.

"Copies of the report have been circulated, sent, I think, to each one of you in sufficient time for you to have an opportunity to read it, and I assume it will not be necessary to spend the day in re-reading it here. The idea of the report is that if we can get a statement of the law so well done as to be generally acceptable, made the basis for judicial consideration, we will have accomplished at the outset a very great advance.

"We recall the part played in judicial decisions by what Judge Story said, not only in his decisions, but in his text books, in his writings; the part played in judicial decisions by what Chancellor Kent said in his great work. To take recent instances, take the work on equity written by John Norton Pomeroy. I have not followed the reports closely enough to know whether it still continues, but for a good many years after the publication of that work the courts quoted what he said with practically the effect that they would have quoted a great judicial decision.

"There is a work now which is playing the same part, Mr. Williston's work on contracts, which is being quoted in that same way.

"Now, if you can have the law systematically, scientifically stated, the principles stated by competent men, giving their discussions of the theory upon which their statements are based, giving a presentation and discussion of all the judicial decisions upon which their statements are based, and then such a statement can be revised and criticised and tested by a competent group of lawyers of eminence, and then when their work is done their conclusions can be submitted to the Bar that we have here,—if that can be done we will have a statement of the common law of America which will be the prima facie basis on which judicial action will rest, and any lawyer, whose interest in litigation requires him to say that a different view of the law shall be taken, will have upon his shoulders the burden to overturn the statement.

"Instead of going back through ten thousand cases it will have been done for him—not a conclusive presumption but a practical prima facie statement upon which, unless it is overturned, judgment may rest.

"If such a thing is done, it will tend to assert itself and to confirm itself and to gather authority as time goes on. Of course it cannot be final, for times are continually changing, new conditions arise, and there will have to be revision after revision; but we will have dealt with the past and have gotten this old Man of the Sea off our shoulders in a great measure.

"It is a great work. It is a work before which anyone might well become discouraged. Unless the work can be done greatly, it is worthless. It is of no use to produce another digest, another cyclopedia. That kind of work is being done admirably. It is no use to duplicate the work of the West Publishing Company, which has done so well. It must be so done as to carry authority, as to carry conviction of impartial judgment upon the most thorough scientific investigation and tested accuracy of statement.

"Can it be done? If it cannot, why, we must go on through this swamp of decisions with consequences which we cannot but dread. The great work of the Roman law had imperial power behind it. Theodosius and Justinian could command and all the resources of a great empire responded. In the simpler and narrower work of the Code Napoleon, again, imperial will put motive power behind the enterprise. What have we? No legislature, no Congress can command; no individual can do the work. Men who come and go, who spend a little time from their ordinary occupations, and go, cannot accomplish it.

"Means must be raised for adequate force, for continuous application. Participation in the enterprise must be deemed highly honorable. Selection for participation must be deemed to confer distinction, it must be recognized as a great and imperative public service. How can it be done? It can be done only if the public opinion of the American Democracy recognizes the need of the service, and that public opinion you here today represent and can awaken and direct.

"That is why the Committee solicited your attendance here, to ask you whether you will put all

that you represent behind the undertaking, so that the American democracy may be behind it.

"You will perceive that it is a simple task in statement, that it stands by itself, and that the organization required is an organization specifically adapted to this particular work.

"I have received a number of letters from friends in various parts of the country suggesting that certain other things ought to be done, especially that there should be a reform of administration of the law, that there should be reform of criminal law. To that I agree, we all must agree. But that is another story. The American Judicature Society, a most excellent institution, is addressing itself to the subject of administration. There is a most excellent society in connection with the criminal law, which is dealing with criminal law. The trouble with the criminal law is chiefly a trouble of administration. In both branches of the law, civil and criminal, there are these existing organizations, which it is not desirable to duplicate or to substitute ourselves for; but further than that, to deal with defects of administration, great defects, requires an organization especially adapted to that purpose, and quite a different organization from one which would be available and effective for this purpose of the scientific study and re-statement of the substantive law.

"Defects in administration have been receiving the attention of the American Bar Association and most of our State Bar Associations for many years. The trouble with reforming them comes when you run against the legislative bodies that have the power to pass the laws necessary to reform them. In my own state most thorough and excellent work has been done on the subject, and when it runs up against the legislature there is always some little thing that the reform hitches on and fails to make progress, and the legislature adjourns without action; and that goes on year after year.

"I busied myself for years in the Senate of the United States in trying to get through reforms in procedure that had been discussed and recommended over and over again by the American Bar Association. Quite often I would get favorable report from the Judiciary Committee; but always there was some little difficulty which prevented their being enacted into law, and the trouble is plain that the motive power behind the demand for reform is not strong enough. You get the real motive power of a people that demand reform behind the demand and no little hitch will occur in the legislature, either of the State or of the Nation.

"But while we are all for reform, we are mildly for reform; we don't put any beef behind it; we don't put any power behind it. Nobody is in danger of being run over by it if he gets in the way. That is the trouble with the demands for reform of judicial procedure, civil and criminal, because almost anyone in the State Legislature or the National Congress can stand in the way and stop it without danger of consequences to himself.

"Perhaps we can help. The gathering of the distinguished leaders of opinion of America here in this hall today will help; the making of a permanent organization to accomplish this re-statement of the law, with the earnest and real interest in the subject on the part of real men, will help; and as time goes on the organization which you have made may accomplish such relations with other organizations and such additional duties, and avail itself of such opportunities, as to aid all along the line in the reform of law and the reform of procedure. But at present it seems plain that the thing to do is to form an organization adapted to this specific thing. Institutions which try to do everything do nothing. This great, difficult task will be load enough for us to carry if we can carry it.

"Gentlemen, many competent observers, many thoughtful students of history, are beginning to fear that the competency of mankind to govern is not keeping pace in its development with the ever-increasing complexity of life in this new era of universal interdependence.

"I have faith that our people will prove themselves equal to the ever-growing, ever-increasing demands upon them, of life, of these strange new years. I have faith; but they can not do it by lying down. No free people, no democracy—and I include in this the American Democracy—can maintain its institutions, its freedom, its justice, its opportunity for the future, unless there be general, practically universal effort, willingness to serve, desire for knowledge, determination to grapple with and deal with the difficult problems that confront humanity.

"We may not succeed, but we can try. Here is one thing we can try. It is something the need of which is universally recognized. It is something the responsibility for which rests especially upon us. It points the pathway where we will be acknowledged the natural leaders of the democracy in its struggles towards better life, towards permanency of institutions. If we fail, who shall succeed? And if none succeed, what becomes of the law which we are, each one of us, from day to day appealing to, and demanding the application of, in the interests of our clients, what becomes of the great system of American law to which we have undertaken to devote our lives." (Applause.)

At the conclusion of Chairman Root's address the report of the Committee was received. Before it was taken up for discussion a member suggested that someone give them an idea of the "mechanics" of the enterprise. Mr. William Draper Lewis, Secretary of the Committee, replied that he thought he could answer the gentleman's question by pointing out what the Committee believe are the four necessary steps to produce something that the Institute, if it is formed, can put forth as its official publication.

"The first step," he continued, "is to select a topic or topics of the law. In the report we have suggested that it would be wise to select at least three topics, but probably not more than three topics at the start. One of the things that the Committee wished out of this meeting was suggestions as to what those topics should be. . .

"Having selected a topic, the next business of the Committee, as we conceive the way in which the work should go forward, is to select what we may call a Reporter, some one person who is responsible for getting before a group of experts on that subject an initial, not complete statement of the topic, but responsible that drafts or parts of the topic are produced. Such a Reporter will have to be an eminent person who is thoroughly familiar with that topic. He must stand out to the country as generally recognized among the members of the legal

profession as having a profound knowledge of that subject, and he must devote his time, for the time being, to that work, and he must be given the necessary assistants. No legal work can be done properly without a thorough examination of the existing authorities. Therefore, that man must have, in view of the vast number of authorities, efficient assistants. Different men are differently constituted. Some men can work best when they practically have very little assistance. Others are accustomed to work, as many of you here are accustomed to operating your law offices, with a large number of assistants; and therefore, whether the Committee should give to this Reporter a number of able men who would assist him, and the character of those men, will largely depend upon the individual characteristics of the particular reporter selected. . .

"The third step is the selection, at the same time that a Reporter is selected, of a group of experts in that subject. Those experts should also be persons who have a profound knowledge of the particular topic. They should also give a portion at least of their time systematically and regularly. They should be compensated. There should be a professional obligation for compensation given, to render systematic and regular attendance at the meetings of the Committee and at work in the time in between the meetings of the Committee. Those of us who have had experience with the Conference on Uniform State Laws know that one of the difficulties of the Conference is that no one is compensated, except perhaps the actual person called draftsman, who is selected. Therefore, too much is left perhaps to the draftsman by the Committee of experts of the Conference. That is an inevitable result, not the fault of the Conference, but the inevitable result of having a group of experts that are not compensated for their work. That is the third step.

"Now, we will imagine that the Reporter has presented a preliminary draft, the Committee has examined that draft, has criticised it, and it is in shape to be put out as a tentative draft and distributed among the members of the Institute and among the members of the profession generally; that it then comes back with criticism to the expert committee; that the Committee return it to the Reporter, and that process goes on, the process of getting out a tentative draft, of having it widely discussed and criticised, and finally the Expert Committee have got to the point where they are willing to stand by that restatement of the law in the general form—I shall not go into that at this time—in the general form as stated in this report.

"Then comes the last step. I do not think anyone who has had any experience in getting out an important piece of legal work wants to have the whole work done by experts on that particular topic of the law. I am quite sure the members of the Committee do not. We believe that the last step is taking this work which has been done by the experts on that topic and putting it before a larger body, such as the members of this Institute that we are talking about, and left them go over it time and time again. When a body of experts in the Conference on Uniform State Laws have finished some one act and they have brought it before the full body of the Commission, they get back a reaction, they get ideas that come not from the expert in that topic, but which come from an intelligent, legally trained audience. That fourth step, this so-called restatement of the law, has to come through. When you are through with that, then you are in a position to determine whether the thing that has been produced, should be put out as the publication of the Institute."

The discussion which followed turned chiefly on the subjects which the Institute would take up for clarification at the outset. The report of the Committee, previously referred to, proposed Conflict of Laws, Corporations, and Torts; and Mr. William Draper Lewis, the Secretary of that Committee, explained that these had been suggested after very careful consideration because they offered a great variety of problems and would thus enable the Institute in its first few formative years to get as wide an experience as possible. However, suggestions as to other subjects were earnestly invited. Ex-Governor Hadley of Missouri and certain other members thereupon urged the advisability of requesting the council, or governing body, of the Institute to give prompt and careful attention to the subject of criminal law, on both substantive and procedural sides, and in case they found a restatement practicable and advisable, that they should proceed to make it.

The suggestion was opposed by others, either on the ground that they did not understand that the Institute was forming for the purpose of dealing with criminal law, or because they did not think it advisable at the outset to cumber the council and the men who were to do the actual work with too many suggestions. The subject of Contracts was also suggested, and it was argued by another member that Corporations, being largely a matter of statute and a subject as to which the text-books had constantly to be revised, was perhaps a trifle too difficult for the Institute to undertake in the beginning. The freest range of discussion was allowed, and in the end the proposals of the committee as to subjects were left unchanged. The Chairman took occasion, however, to state that this did not prevent the council from taking up the subjects suggested, in case it desired to do so.

The by-laws were carefully considered and the tentative draft was amended in some respects in order to perfect an organization calculated to secure the confidence of the public. With this object in view, on motion of Judge Dickinson of Chicago, it was provided that members of the council, which is to be the governing body, should be elected by the members of the Institute, instead of making the council self-perpetuating, as had been suggested. The council, however, was given the power to choose members and fill vacancies until the next annual meeting. Members are to serve for nine years, but the first council is to divide itself by lot into three classes, to serve respectively three, six and nine years, in order to insure a continuity of experience.

The first council chosen consisted of twenty-one members, but they were authorized to select additional members until the next annual meeting, with the proviso that the total membership of the body must not exceed thirty-three. The officers are to be chosen by the council and will hold for one year or until their successors are elected. They will be

a President, vice-president, treasurer and secretary, each having the powers and duties incident to such offices. No member of the council, while serving in that capacity, shall receive any compensation from the Institute. The council was authorized to appoint an executive committee and delegate such powers as it deems proper. Meetings are to be annual. They may be called by the council on three weeks' notice, and shall be called on a written request of fifty members. Fifty members shall constitute a quorum and a majority of the members voting on the question at the annual meeting may amend the by-laws.

The members of the Institute will be those whose names appear on the roll of the Washington meeting on the invitation of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law; the members of the council and any other persons elected by the council or the Institute; during the continuance of their respective offices, the Chief Justice and the Associate Justices of the Supreme Court of the United States, the Senior Judge of each Circuit Court of Appeals, the Attorney-General and the Solicitor-General of the United States, the Chief Justice of the highest court of each state, the president of the American Bar Association and the members of its Executive Committee, the president of each state bar association, the president of the American Institute of Criminal Law and Criminology, the president of the American Branch of the International Law Association, the president of the American Judicature Association, and the president of the Commissioners on Uniform State Laws.

The resolution approving the formation of the American Law Institute was offered by Mr. George W. Wickersham and unanimously adopted. After this the meeting approved a form of certificate of incorporation and by-laws also presented by Mr. Wickersham, who briefly explained that it was drawn under the laws of the District of Columbia, provided for perpetual existence and set forth the objects of the organization as they had been previously stated. A committee on nominations proposed the following twenty-one members of the first council, and the meeting unanimously elected them: Elihu Root, George W. Wickersham, Learned Hand, Victor Morawetz, John G. Milburn, George Wellwood Murray, Harlan F. Stone, Benjamin N. Cardozo, John W. Davis, William Draper Lewis, George E. Alter, Alexander King, Andrew J. Montague, Emmett N. Parker, James P. Hall, William B. Hale, Edward J. McCutcheon, Arthur P. Rugg, Samuel Williston, Cordenio A. Severance, Herbert S. Hadley. The council thus elected was, on motion of Mr. Wickersham, unanimously adopted, "directed to call for further criticism of the plan outlined in the report of the Committee for the Establishment of a Permanent Organization for the Improvement of the Law, to call for suggestions as to the scope of the project and the mode of carrying it out, and to hold hearings if desired by any member of the Institute present at this meeting or hereafter becoming a member."

While the committee on nominations was conferring, Chairman Root took occasion to answer a question that had been asked as to plans for financing the enterprise. He stated that this was a very appropriate question and one that had doubtless occurred to many members. "The volunteer committee that started this matter," he continued, "realized that it would cost a good deal of money to go on with the work. They realized that the work cannot be done by casual dipping in of busy men out of the hours of their ordinary business, that able and competent men have got to be employed and paid to devote their time to the work, in the first instance.

"They realized also that it was impossible to secure funds for any great enterprise so long as it was vague and problematical, and that it was necessary to carry it to such a point that persons appealed to to contribute would see that there was a real movement, with real power behind it, and a reasonable certainty of its going on and doing work. And they felt confident that if this body which has been called together here would put itself behind the undertaking, they could then go to the same sources which have endowed the colleges and the hospitals, and all the great public institutions supported by private contributions, the same sources that supply the money for Eastern Relief and the Red Cross, and be certain that a great public work having public recognition and needing only to be supplied with means to carry it on would meet with a response.

"Of course if the money cannot be raised to pay the expenses, the undertaking will fail. Equally, of course, if this body is to be behind the work, the money will be obtained."

A banquet was held in the evening at the new Willard, at which Chief Justice Taft presided as toastmaster. Ex-Governor Hadley made a very illuminating address on the work accomplished under Justinian and on the preparation of the Code Napoleon. President John W. Davis of the AMERICAN BAR ASSOCIATION spoke briefly on the newly formed Institute and the aid which the American Bar Association can furnish. It is hoped in a later issue to devote to the banquet proceedings the attention which they deserve.

At the meeting of the Council on February 24, Hon. Elihu Root was elected honorary president of the Institute and Hon. George W. Wickersham, president. Judge Benjamin Cardozo of New York was chosen vice-president, William Draper Lewis of Philadelphia, secretary and George W. Murray of New York, treasurer.

Those Irresistible Subsidies

"National subsidies are limited only by the extent of federal revenue, and by the limits, if any, upon the persistence with which new subsidy schemes are urged upon Congress. With respect to matters judicially cognizable, the Supreme Court of the United States may be relied upon to protect state powers. But no organization exists for the restriction of the evils of the subsidy plan. The development of this plan is dangerous to the national treasury; but in favor of any proposed subsidy it is possible to organize a mass of state and local pressure not capable of effective political resistance. Unfortunately neither state governments nor their local subdivisions can be expected to resist encroachments upon state and local authority through the subsidy plan, for governments are usually willing to surrender control over policy in return for additional and immediate revenue."—Yale Law Journal (March).

THE "NEW FEDERALIST" SERIES

First Two Articles of Program Outlined by Journal for Helping Revitalize the Constitution in the Public Mind—Judge Francis E. Baker writes on Our American Constitution and Hon. Frank O. Lowden on Representative Government—Series Will Be Distributed to Press Under Auspices of American Citizenship Committee of Association

In the task of helping to explain and sustain American institutions by promoting a clear understanding of the reasons for them, the American Bar has an important part to play. Conscious of the need and the responsibility, the AMERICAN BAR ASSOCIATION JOURNAL has undertaken the program of printing a series of brief articles, beginning with the March issue, on American principles of government, under the title of "The New Federalist." There is not a particle of political significance in the title chosen. The historical political significance definitely attached to the name "Federalist" came after the publication of that remarkable series of Federalist Papers, in which Hamilton and Madison and Jay engaged in the task of enlisting the support and reaching the mind and heart of people in behalf of the Constitution under which we have lived and prospered so long.

These articles will not be addressed to the legal profession, which will find the justification of such contributions in the character of the work done and the importance of the proposed public service, but to those who need the information. They will be clearly written, reasoned and not declamatory, adapted to the fair intelligence of both native and foreign-born citizens, and will make a special effort to counteract current misconceptions on fundamental points. —(From announcement of the New Federalist series in the JOURNAL, February, 1923.)

Our American Constitution

By HON. FRANCIS E. BAKER
Judge U. S. Court of Appeals, Seventh Circuit

THE present phantasmagoria of the world's governmental nightmares warns us to reject all vagaries between and including the autocrat's schemes of imperial aggression and aggrandizement at the one end and the communist's dreams of proletarian dictatorship at the other, and makes us realize more than ever the wonderful work of those who five generations ago evolved a plan of government of and for and by the people—all the people, without caste or class or special privilege.

The foundation stones were at hand. They had been gathered during our forbears' struggles of a thousand years to emerge from tyranny. Freedom of publication, of speech, of religious opinion; trial by jury in criminal and common law cases; due process of law in all cases; equal protection under the law; guaranties against ex post facto laws, against laws impairing the obligation of contracts, against Star-Chamber self-incriminations, against invasions of the home for unreasonable searches and seizures, against arbitrary and unwarranted arrests and imprisonments—all these were ready, and by common approval of the designers were builded into the foundational Declaration of Rights.

But it was when the great architects came to planning the super-structure of our dual system of representative government, national and state, that their genius for accommodation, for calculating and providing against stresses and strains, came into play and produced a result that should forever command the awe and admiration of mankind. Our earth moves in harmony among the spheres of heaven, balanced by opposing centrifugal and centripetal forces. If the centrifugal should preponderate, we would fly off into chaos; if the centripetal were the stronger, we would be dragged into the solar fires. And at the Convention, presided over by the strong and wise Washington, there were opposing centrifugal and centripetal forces.

On the one side were the great patriots who, with prophetic vision saw, while yet we occupied only the Atlantic fringe, a continent inhabited by American citizens. They appreciated the need, then and now indisputable, of organization by states, in order that the particular local requirements of each state community might be ruled exclusively by state laws. On the other side were the great patriots who, with like vision, foresaw a mighty people consolidated into a mighty nation to stand forth among the nations of the world with equal sovereignty. They had been sharply taught by the impotence and failure of the Articles of Confederation that no plan of super-government based upon other governments as units has power to function; that no government has power to function unless it has the direct and immediate allegiance of the citizen and the direct and immediate right to put his person into its army and his purse into its treasury.

Now, with those opposing forces, if the centrifugal had preponderated so that all governmental power had been lodged in the sovereign states, we might today be torn and disrupted, just as Eastern Europe is today, by heterogeneous and hostile local laws and barriers; if the centripetal forces had prevailed so that all governmental power had been put in one central authority, we might today be ruled by an autocracy that would neither appreciate nor consider the multiform and variant needs of communities three thousand miles apart. But to the everlasting glory of our patriot sires, they composed

their differences; they balanced evenly the opposing tendencies so that exclusively state matters are settled exclusively by the states, and exclusively national matters are settled exclusively by the nation; they clearly divided governmental power into three co-ordinate but independent branches, with adequate checks between them, so that no officials of any class should deem themselves the government and so that each official should know that he is merely a limited agent of the sovereign people; and thus they formed the "indissoluble Union of indestructible states."

Now, let us glance more in detail at the structure of our national machinery. There are three parts: the legislative, the executive and the judicial.

In the legislative part, there are three elements: the House of Representatives, the Senate and the President.

The House is made up of Congressmen, who are elected to serve two years. All the states are divided into districts, according to population, and each district is entitled to one Congressman. As the Congressmen are so closely connected to the people, no tax can be laid upon the people except by a law which originates in the House.

The Senate is made up of Senators, who are elected to serve six years. Each state is entitled to two Senators. Originally, Senators were chosen by state legislatures. Since 1913, Senators have been elected directly by the people; but that change did not affect the original purpose of having the Senate act as a governor on the steam engine of the House. That result comes from two sources. One is the fact that a third of the Senate is elected each two-year period, and thus at least two-thirds of the Senators are experienced men. The other is the fact that Senators are chosen from larger units (which is supposed to give them a wider outlook, at least state-wide, if not nation-wide) and constitute a much smaller body in which there is better opportunity for consideration and debate of proposed legislation.

The President is not a part of the legislative machinery in the same sense as the House and Senate. But in our system of checks and balances the Constitution gives the President important functions in legislation. Because in performing his executive duties he gets the widest knowledge of national and international conditions, he is directed to address Congress from time to time on what he believes is needed in new laws or in changes of old laws. And if the House and Senate agree that a bill should become a law which the President believes is against the public good, he expresses his disapproval by a veto; and the proposed law is dead unless two-thirds of the House and two-thirds of the Senate override the veto.

The executive power of the United States is vested in the President. His term is four years. He is chosen by "electors." The voters of each state elect a number of electors equal to the sum of Senators and Congressmen for that state. The President executes the laws of the nation through subordinate officers whom he appoints with the consent of the Senate. The principal executive officers are the members of the cabinet, who head the Departments of State, of War, of the Treasury, of Justice, of the Postoffice, of the Navy, of the Interior, of Agriculture, of Commerce, and of Labor. The President is Commander in Chief of the Army and Navy, but he has no money for soldiers and ships and no right to make war except by authority of Congress. The President has the pardoning power. He has the right to negotiate treaties with other nations, but the treaties do not go into effect unless ratified by a two-thirds vote of the Senate.

From the Senate's power to reject treaties and appointments to office, it is evident that the Constitution makes the Senate an element in the executive department of the government, somewhat as the President was made an element in the legislative department.

At the same time with the President, a Vice-President is elected. He presides over the Senate; and in case of the death or disability of the President, he becomes President.

The Constitution vests the judicial power of the United States in one Supreme Court, and in such subordinate courts as Congress may establish. Congress has divided the states into nine groups, called circuits. In each circuit is a Court of Appeals, made up of three judges. Each state is made into one or more districts, as needed; and in each district is a District Court. The District Courts are those in which lawsuits are begun and tried. The Courts of Appeals are intermediate reviewing courts, created by Congress to act as strainers to prevent the Supreme Court from being overwhelmed by the flood of appealed cases. The Supreme Court, made up of nine judges, is the ultimate tribunal for deciding all cases arising in subordinate United States Courts, and also all cases in the highest courts of the states which involve questions arising from the Constitution of the United States. All United States judges are appointed by the President, with the consent of the Senate, to serve during good behavior. They, and all other civil officers of the United States, can be removed only by impeachment for crimes or misdemeanors. In impeachment proceedings, the House acts as a grand jury to present the charges; the trial is prosecuted by a committee of the House; and the Senate (presided over by the Chief Justice of the Supreme Court if the defendant is the President, otherwise by the Vice-President), acts as the court, a two-thirds vote being necessary for conviction.

Such in outline is our National machine of government. Without any essential alteration or repair it has been in successful operation for one hundred and thirty-three years. But because the Fathers of the Constitution spent only four months together in consultation, do not imagine that they drew the designs and produced the materials in any such brief time. From the early years of the seventeenth century on down to the adoption of the Constitution, our American predecessors had been accumulating experience in representative self-government. Away back of our Colonial Charters was the struggle of the common people in England for a voice through the House of Commons in Parliament; back of that the right of assemblage of free men was evidenced in the Anglo-Saxon Witenagemote, "assembly of wise men"; and early seeds may be found in the customs of Germanic tribes that migrated to England.

Before our National Constitution was written, that accumulated experience had been used in

framing State Constitutions. The general type had become well developed. The people were the source and possessors of the sovereign power; and all officers of government, grouped into the three separate and independent departments—legislative, executive and judicial—were merely agents, each within his prescribed sphere, to exercise the power of the sovereign people.

But no one can understand our national machine of government simply by regarding its structure. He must know the conditions and circumstances in which it is expected to work and the motive power that operates it.

Thirteen colonies had struck for freedom. They set up thirteen states. Each state, after the Declaration of Independence had been fought into fact, could have stood forth among the nations of the world as separate as England and France. During and after revolutionary war times, they had tried to get along together in the Continental Congress and in the "loose league of friendship" under the Articles of Confederation. Those means had failed, and the people knew why. They wanted to preserve the full sovereignty of their state governments and they had come to desire at the same time a national government with full sovereignty. But two authorities can not both be supreme over the same matter at the same time. And so it was necessary for the framers of the National Constitution to cut off parts from the sovereignty of the states to weld those parts together into a National Sovereignty. Thus came into existence our dual system of government, the nation to be supreme in all foreign and domestic matters that touch all the people of the United States, and each state to be supreme in all matters that are local or peculiar to itself. Consequently, our national machine of government must be thought of as operating at the same time and in harmony with the machinery of the several states.

The outcome has proven that a nation could be created by granting to Congress the following powers: To levy taxes and to borrow money for national purposes; to regulate foreign and interstate commerce; to naturalize aliens; to make bankruptcy laws; to coin money and punish counterfeiting; to fix weights and measures; to establish postoffices and roads; to grant patents and copyrights; to declare war, raise armies and navies, and supervise state militia; to punish offenses against the law of nations; to have exclusive control of the District of Columbia as the seat of national government; and to make all laws necessary for carrying into execution the foregoing powers.

Of these few grants of power three are what really vitalized the nation: the power of the purse, the power of the sword, and the power over commerce. And of these three the most important one in molding us into one people and in preventing bickerings back and forth across state boundaries is the exclusive power of Congress over interstate commerce.

But these national powers would never have come to fruition except through the interpretation and enforcement thereof by the national courts. Had it not been for the Supreme Court's implanting of the principles of vitality and growth, what is now a living organism might never have been more than a dead writing.

And the national courts have contributed to our unity in additional ways. Think what a source of irritation and prejudice it might be if a citizen of one state could not sue a citizen of another state except in the local court of the county where the defendant lives. Think what a disrupting influence it would be if there was no court with power to stop a state from discriminating against or confiscating property because the owner lived in another state. Think what would happen to the citizen if there was no court with power to stop state governments and the national government itself from destroying his constitutional right to freedom of speech and religious opinion and his constitutional guaranties against forced self-incriminations, unreasonable searches and seizures and arbitrary and unwarranted arrests and imprisonments.

When anyone insists to you that the power of the national courts under the Constitution should be curbed and their right to declare acts of Legislatures and Congress unconstitutional should be denied, ask him this: Should the people be supreme, or should their agents be free to do as they please? If the sovereign people are to retain their supremacy, must they not limit the authority of their governmental agents? How can the limitations be made definite and clear and permanent except by putting them in a written constitution? And how can any principal enforce the limitations in the power of attorney of his agent except in a court set up by the people for that purpose?

How wonderfully balanced is our dual system of local and central governments. And how flexible. We can add to the list of national powers, as we have done with the new subjects of intoxicating beverages and votes for women, if experience warrants the enlargement. Likewise, experience may be expressed in curtailment of national powers. And we should never be hasty in altering the National Constitution. For we have forty-eight laboratories in which to test new materials (initiative and referendum, recall, guaranty of bank deposits, government ownership and operation of utilities, and any others) before they are built into the national structure. If a new thing (the Australian ballot, for example) proves its worth, it may spread to all the states and be adopted for national purposes. If a new thing in state government proves disastrous, the injury is confined to a small area and there dies out.

This system of government is distinctively American. It has won the plaudits of great statesmen, historians, and students of government throughout the world. It has served as a model for other constitutional republics. It has been of greater influence in forming the governments of British Dominions than have been the institutions of Old England. Surely it merits our admiration and love.

Representative Government

By HON. FRANK O. LOWDEN

Former Governor of Illinois

THE framers of the Constitution attempted to found a republic, and not a pure democracy. Though there is no definition of "republic" upon which all men agree, it is clear that the men

who assembled in old Independence Hall to create a new government regarded the principle of representative government as the very essence of a republic.

These men were as familiar with the history of the governments of the past as we are today. They knew the story of Sparta and of Athens and of Carthage, of Venice and of Rome. They had seen that these democracies, one after another, had failed; and they knew, as Alexander Hamilton later said in the Federalist, that "such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property, and have in general been as short in their lives as they have been violent in their deaths."

Both Hamilton and James Madison, who shares with him the authorship of the Federalist, have drawn a clear distinction between that form of government and the republic which the makers of the Constitution had in mind. "A republic," says Hamilton, "by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the union... The two great points of difference between a democracy and a republic are: First, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended."

James Madison also makes the same distinction between a republic and a democracy, but goes farther and lays down the limits within which a pure democracy can operate successfully. "As the natural limit of a democracy," he says, "is that distance from the central point which will just permit the most remote citizens to assemble as often as their public functions demand, and will include no greater number than can join in those functions; so the natural limit of a republic is that distance from the center which will barely allow the representatives to meet as often as may be necessary for the administration of public affairs."

But this idea of a representative form of government, which the framers of the Constitution so clearly intended to set up, was not a discovery of our fathers. It was borrowed from England. England first applied this new principle to government before the Norman Conquest. John Fiske, the historian, declares that this "was one of the greatest steps ever taken in the political history of mankind"; and he assigns the failure of the great political system of Greece and Rome to its absence. "The chief problem of civilization," he declares, "from the political point of view, has always been how to secure concerted action among men on a great scale without sacrificing local independence. The ancient history of Europe shows that it is not possible to solve this problem without the aid of the principle of representation. Greece, until overcome by external force, sacredly maintained local self-government; but in securing permanent concert of action, it was conspicuously unsuccessful. Rome secured concert of action on a gigantic scale, and transformed the thousand unconnected cities and tribes it conquered into an organized European world; but, in doing this, it went far toward extinguishing local self-government. The advent of the Teutons upon the scene seems therefore to have been necessary, if only to supply the indispensable element, without which the dilemma of civilization could not be surmounted."

Representative government, thus made the cornerstone of the new republic, is no abstract theory. It is only the application to government of a principle which men have found by experience useful in other important affairs of life. Government daily becomes a more and more complex and difficult thing. The citizen selects some one learned in the law to represent him in a lawsuit, or some one skilled in medicine if his child is ill; and he ought to be permitted to select some one to represent him in his government. Even voluntary associations, as soon as they become so large that the members cannot meet personally, are adopting the representative principle of government. For a time, when members could not attend, they sent their proxies in their stead, with implied or express instructions to the proxy holder to vote in a certain way. This was only a form of pure democracy in the government of these voluntary associations.

When, however, the associations became large and had important business to transact which required care and deliberation, it was found that these absent members could not foresee what the wise thing to do was. A system of representation through delegates is, therefore, being substituted for the pure democracy of earlier times. The modern great farm organizations—those which have business to transact and do not content themselves with mere oratory and resolutions—generally employ the delegate system. So do many other similar organizations, which will readily come to the reader's mind. Can it be that the principle of pure democracy fails in these voluntary associations which prescribe themselves the qualifications of their members, and yet is adequate for the vastly more important and more intricate business of government in which all men participate?

But though it is thus based on such a wealth of political and practical experience, representative government has its assailants, direct and indirect. No form of government administered by imperfect man can be perfect; but every imperfection affords a text for the advocate of some partial or complete substitute, guaranteed to do all things well. Socialism, anarchism, dictatorship of the proletariat, are proposed substitutes that need not detain us. Russia is the terrific answer to all that today. But the advocates of a complete substitution of the initiative and referendum in legislation for legislative action are also attacking the foundations of representative government. That proposition is perhaps the most conspicuous example of the effort to reinstate "pure democracy," that is, government by direct action of the people, which has received even a measure of attention of recent years. It is not necessary to discuss whether a resort to this occasionally, on special or extraordinary occasions, and as to questions admitting of

a ready and complete answer in the simple form of "yes" or "no," may not be comparatively harmless in a limited area where the representative machinery and idea are retained for the real business of government. The best way to judge of the validity and tendency of a principle is to consider it as completely in action in the field in which it is supposed to operate beneficially. The question, therefore, at bottom is this: Can the people legislate more intelligently and satisfactorily than the representatives?

It is admitted that the representative in Congress or in a State Legislature finds it a very difficult matter always to vote wisely. And yet he gives all or the greater part of his time to his legislative duties. He has the opportunity of listening to and participating in debates. Debate is a great clarifier. I know that it is popular these days to speak lightly of legislative debates. There *are* many speeches made in Congress and in our State Legislatures for the benefit of constituents at home, which do not throw much light upon any question. These are the speeches which usually find their way into public print. There are, however, in every legislative body, in debates upon important questions, very able speeches showing great learning and industry, which do elucidate and help to determine the final action of the legislative body. There is also the right of amendment. There is rarely an important measure which passes either a State Legislature or Congress that, during the course of the debate, does not reveal some defect which is removed by amendment. The most skilful draftsman of laws will tell you how almost impossible it is to draft a law upon a difficult subject which will not be improved after it has run the gauntlet of debate. Notwithstanding all these advantages of the representatives, he will tell you that frequently the question is so close in his own mind that he is not sure he has acted correctly.

What, then, must be said of the ordinary citizen upon whom the burden of legislating directly is imposed? He must devote the larger part of his time to his own affairs. Just before election, there are brought to his attention any number of propositions upon which he must vote. These propositions are likely to be complex and to cover subjects of which he has very little actual knowledge. There are involved questions of construction over which even lawyers may disagree. He has no opportunity of listening to anything like adequate debate. He may, after thorough study, approve of a proposition in principle, but wish to amend it in some respects. There is no opportunity for this. He must vote either for it or against it as it stands. It is unfair to the voter to impose this burdensome duty on him. It tends to discourage him from performing his duties as a citizen. Students of government everywhere have come to the conclusion that if you are to expect the people to discharge faithfully their duties of citizenship, you must not make these duties unreasonably burdensome by frequent elections or by imposing too difficult tasks.

It is said, however, that the people cannot trust the representatives they themselves select. It no doubt is true that in some instances the citizen is betrayed by the representative he has helped to elect. So, at times—rare indeed in America, I like to think—the lawyer does not faithfully serve his client. So with the physician. So with the banker. And so with all others we are compelled to employ under the conditions of modern civilization. But if the lawyers of the country generally could not be trusted, how long would society endure? If physicians generally were to betray their patients, how long would the nation live? If the bankers whom we select to safeguard our funds generally were to embezzle them, how long would we last? And if those whom the people select to represent them in the most important of all affairs are to betray them, orderly government must fail. No device of the initiative and referendum or recall will save us. Our national character will have sunk so low that we will be doomed. But let me put the question: If the citizen cannot select from among his neighbors, among those whom he knows, some one who will fairly represent him, what chance has he to act wisely upon the incomparably more difficult matter of legislation itself?

Unless we maintain the representative principle in government, the Federal principle, too, must go by the board. Without adherence to the Federal principle, if John Fiske is right, the great republic will go the way of Greece and Rome. The principle of Federation, since it was written into our Constitution, has gained steadily in the estimation of the students of government the whole world 'round. Last summer, two great Englishmen visited America—Lord Shaw and Lionel Curtis. In addresses, both emphasized the Federal principle as America's greatest contribution to the science of government. Now the leading statesmen of China, if I am correctly informed, are seeking to apply the Federal principle to their great country. It is not too much to predict that if order shall come out of the chaos which has afflicted that unhappy land for years, it will be due to the application of the Federal principle which our Fathers wrote into the Constitution of the United States. And now ,when the world is following our lead in this respect, shall we withdraw the chief support of that principle—representative government?

History has proved, if it has proved anything, that democracy can succeed only if it has the capacity to select wise leaders. Men may be incapable of answering complex questions in government, but may easily be able to select some one who can. I know of no more impressive pages upon the subject than those contained in the last chapters of Lord Bryce's "Modern Democracies," recently published. After a survey of the whole field, and after summing up with great clearness the advantages and disadvantages of the democratic principle in government, he asks:

> What, then, becomes of Democracy? What remains to the Many? Three rights and functions; and they are the vital strength of free governments. Though the people cannot choose and guide the Means administration employs, they can prescribe the Ends; and so although government may not be By the People, it may be For the People. The people declare the End of government to be the welfare of the whole community and not of any specially favored section. They commit the Means for attaining that end to the citizens whom they select for the purpose. They watch those selected cit-

(*Continued on Page 180*)

GEORGE RECORD PECK

By Hon. Jacob M. Dickinson
Former President American Bar Association

GEORGE RECORD PECK was born near Cameron, New York, May 15, 1843. His parents were Joel M. and Amanda Purdy Peck. He died in Cook County, Illinois, February 22, 1923.

Such a brief record as can now be made will seem uneventful and prosaic as compared with that of many of his associates, and yet in his vigor, none surpassed, and but few equalled, him in the generous qualities of heart and soul, and in the intellectual strength and brilliancy that lift a man above his fellow men.

Those who constantly came within the circle of his charms felt that, in almost every company, he, in what made the inner man, like Saul in stature, "from his shoulders and upward was higher than any of the people."

To those who knew him well any portraiture will seem flat and commonplace, unless some one will commemorate him who not merely gazed with admiration upon, but trod the heights, upon which he moved.

GEORGE RECORD PECK
President American Bar Association 1905-6

He was of large, powerful frame, endowed with great strength and endurance, his head was massive, his face handsome, his expression genial and attractive, his eyes open and fearless, his laugh hearty and infectious, his voice powerful, yet finely modulated, his bearing graceful and commanding.

He was of positive convictions, courageous in their support, and always definite and strong in his views of religion, politics and government.

He volunteered at an early age in the Union Army as a private in the First Wisconsin Heavy Artillery, and served throughout the war, becoming a Captain in the Thirty-First Wisconsin Infantry.

While, in later years he did not incline to church attendance, he never wavered in his reverence for Christian standards and beliefs, nor did he cheapen his wit by scoffing at religion. He must have conformed more regularly in earlier days and have achieved a recognized religious status, for he related that in Topeka it was announced that, on account of the absence of the pastor he would read a sermon; that his friends of lighter mood filled the front pews and that when the collection was taken up, he leaned forward and said *sotto voce* "It takes a ten to open this"; that all responded, but after the sermon they lined up at the door and demanded their money back, saying that the performance was not worth it.

He lived in the "roaring" days after the war, in Kansas, and imbibed much of the spirit of those fiery times. A man of his breadth of mind, and gentleness of nature, could not cherish ill-will, and although he had invaded the South, and was as earnest and aggressive in that as he was in all that he undertook, and never modified in one iota his views on the fundamental principles involved in that struggle, he loved to visit the South and gathered to his heart many friends from that section, some of whom were among his most cherished intimates.

The friendship between him and Private John Allen was devoted, and in their old age pathetic. They visited in their respective homes, and together basking in the balmy breezes of the Gulf in their old age, fought over their battles and merrily twitted each other.

When the monument at Vicksburg to General Stephen D. Lee was unveiled, he delivered a great and eloquent oration, breathing a spirit of broad and general patriotism that embraced the entire country, and doing full honor to those whom he had opposed.

He wrote to Allen, saying that he was going to do a magnanimous act and unveil a monument to a rebel General who had tried to break up the best government in the world; that he understood that the Confederate Veterans would be meeting in Memphis and that if Allen thought it would be agreeable, he would stop over and fraternize with the old "Rebs." Allen urged him to do so, saying, "You will get the warmest welcome of your life. I have talked with the old boys, and they say that they have nothing whatever against you, for you did them less harm than any man who fought

on the other side." Peck afterwards retorted by saying that, since he had traveled with Allen and had seen part of the country where he lived, he could never forgive himself for fighting to keep it in the Union.

He delivered at the University of Virginia an address that was received by his hearers and the entire country with warm praise and appreciation.

On another occasion he delivered a great oration at the unveiling of a famous monument to a noted General. The next day a friend said, "Peck, that was a wonderful speech you made, but there were some things you did not tell." He replied, "I unveiled the monument and not the man."

He did not have the advantages of a liberal education, but few who had enjoyed the best opportunities equalled him in solid achievements or shone with such steady brilliancy.

Throughout his life he was a constant, critical and appreciative student of all kinds of books. His literary library contained over 12,000 volumes, selected with informed judgment. They were not for display, but for study. To history and biography he was most inclined, but he acquired a mental clarity, a knowledge in all branches of literature that was equalled by few of his contemporaries. In his advancing years he turned most to the Greek tragedies, the philosophical writings of Cicero and the works of Plato, the great repository from which he said was drawn so much of what is called modern. He loved to trace in the Republic and Gorgias the simple life, mob caprice and rule, natural and unforced kindergarten education, socialism, birth control, eugenics, psycho-analysis, women's rights, and even the rule of reason.

His fine taste and judgment were sustained by a memory that seemed infallible, and was stored with rich and ready knowledge that seemed inexhaustible. He never quoted negligently nor inaccurately. His mind reproduced like a photograph. His wit and repartee would fill a volume and would bear company with Sheridan and Sidney Smith.

Although good-nature, and goodfellowship almost invariably characterized him, yet at times there was a well merited sting.

A judge whose course drew sharp criticism was engaged in a social contest. Mr. Peck was one of the judges who decided against him. The following day the judge walked into a Club and shaking his finger at Mr. Peck said, in a voice manifestly raised to carry to others, "That is the corruptest court I ever went up against." The response came like lightning—"But, Judge—you do not practice in your own court."

As a lawyer he had a standing for learning and ability which was nation-wide.

He was admitted to the bar in 1866, practiced at Independence and Topeka, Kansas, became United States District Attorney for that State, and declined appointment to the United States Senate to succeed Senator Plumb. He became General Solicitor of the Atchison, Topeka and Santa Fe Railway Company. He moved to Chicago in 1893, became General Counsel of the Chicago, Milwaukee & St. Paul Railway Company, and carried on a general practice in the firm of Peck, Miller and Starr. He argued many cases of great importance. The limitations of this paper will not permit detailed mention.

In 1905 he was made President of the American Bar Association.

He delivered a number of orations which commanded wide attention. Among the most notable were: "The March of the Constitution," that on General George H. Thomas, and the one on Washington, before the students of the Chicago University. He wrote philosophical treatises, the best known of which was "The Kingdom of Light", which was widely read and won great distinction. He received the Degree of L. L. D. from the University of Kansas, Union College, Bethany College, and Northwestern University.

He left three children: Mrs. George P. Earling, Mrs. Mary E. Thompson, and Mrs. G. N. Wilson.

A man's quality and character are best attested by the number and kind of his devoted friends. Judged by this standard, the life of George R. Peck was rich in fulfillment. He had not only a host of admirers, who loved the sunshine of his presence, but devoted, true, and loyal friends, in such number as only men of rare qualities draw about them.

These all felt that with him, went out the light that most illumined, the joy that most enlivened, the wit that most dazzled, the spirit that most charmed their social gatherings, and that the world had for a time for them become stale and commonplace.

Solicitor's Negligence in Believing Lady.

"The well-established principle that solicitors are answerable for any lack of reasonable care, skill and diligence in the discharge of their professional duties seems to have been rather extended in Jones v. Lattey and Hart (February 16), where a special jury, after a summing-up by the Lord Chief Justice, awarded the plaintiff £250 damages. The circumstances which resulted in this adverse verdict, if they reflected upon the solicitors' knowledge of the world, certainly did not show any lack of care, skill or diligence on their part. They were instructed by their client to make inquiries into the relations of his wife with an actor, and, if necessary, to employ a detective with a view to proceedings in the Divorce Court. The lady, calling upon the defendants, succeeded in inducing them to believe, though her guilt was clearly established when her husband subsequently took proceedings against her, that there were no grounds for divorce. The plaintiff, having obtained his decree, claimed that, if the defendants had done their professional duty, he would have obtained it earlier than he did, and would have saved the £260 which, as the result of the defendants' report to him, he had paid to his wife for maintenance."—The Law Journal (Feb. 24).

CONTRIBUTIONS

The board of editors wish the members of the Association to feel that the JOURNAL is a forum in which every question of broad interest to the profession in general may be discussed. Articles and letters are welcomed and those who send them may be assured that they will receive prompt and careful attention.

REVIEW OF RECENT SUPREME COURT DECISIONS

Limitation of Federal Court's Right to Enjoin a Later Suit on Same Cause in State Court—Appeal to Circuit Court of Appeals and Supreme Court on Jurisdictional Question—Counter-Claims Under Equity Rule 30—Jurisdiction Over Corporate Defendant in Copyright Cases—Right of Non-Resident Under Section 51 of Judicial Code—Service of Process—Removal of Causes—Determining Amount Involved in Suit

By Edgar Bronson Tolman

Practice.—Conflict Between State and Federal Jurisdiction

A Federal court to which an action in personam is brought on the ground of diverse citizenship cannot enjoin a subsequent suit begun in a state court on the same cause of action.

Kline v. Burke Construction Co., Adv. Ops. 91, Sup. Ct. Rep. 79.

The Burke Construction Company, a Missouri corporation, brought an action at law in a Federal District Court for breach of contract, against the members of a municipal Board of Improvement, citizens of Arkansas. After this suit was begun, the Board brought a bill in equity in an Arkansas state court against the Company and the sureties on its bond, alleged breach of the same contract, and asked an accounting. In the suit at law the Board filed an answer and cross complaint, and in the equity suit the Company did likewise, so that, except for the presence of the sureties as parties in the equitable proceeding, the two cases presented substantially the same issues, and both asked a money judgment only. The action at law in the Federal Court resulted in a mistrial. Thereupon the Company filed a bill in the District Court as a dependent bill to its action at law, and asked that the Board be enjoined from further prosecuting the equity suit in the state court. The District Court denied the injunction, on appeal to the Circuit Court of Appeals for the Eighth Circuit this decision was reversed, and on writ of certiorari to the Supreme Court the decree of the Circuit Court directing an injunction was in turn reversed and the cause remanded.

Mr. Justice Sutherland delivered the opinion of the Court. He said:

> It is settled that where a Federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the Federal court. Where the action is *in rem*, the effect is to draw to the Federal court the possession or control, actual or potential, of the *res*, and the exercise by the state court of jurisdiction over the same *res* necessarily impairs, and may defeat, the jurisdiction of the Federal court, already attached. The converse of the rule is equally true—that where the jurisdiction of the state court has first attached, the Federal court is precluded from exercising its jurisdiction over the same *res* to defeat or impair the state court's jurisdiction.

After quoting from a case explaining this rule, he continued:

> But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other the effect of that judgment is to be determined by the application of the principles of *res judicata* by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded. (Citing many cases.)

The learned Justice reviewed a number of authorities, and then said:

> Prior to the decision in the instant case, as an examination of the foregoing authorities, and others which might be added, will show, the rule was firmly established that the tendency in a Federal court of an action *in personam* was neither ground for abating a subsequent action in a state court, nor for the issuance of an injunction against its prosecution.

Petitioner's contention was, however, that to allow the issue to be tried in the state court would in effect deny him his constitutional right to trial in a Federal court, and he sought to distinguish the cases supporting the rule just laid down upon the ground that in them the constitutional question had not been raised. To this the learned Justice made the following reply:

> The right of a litigant to maintain an action in a Federal court on the ground that there is a controversy between citizens of different states is not one derived from the Constitution of the United States, unless in a very indirect sense. Certainly it is not a right *granted* by the Constitution. The applicable provisions so far as necessary to be quoted here, are contained in article 3. . . . The effect of these provisions is not to vest jurisdiction in the inferior courts over the designated cases and controversies, but to delimit those in respect of which Congress may confer jurisdiction upon such courts as it creates. Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. . . . A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right.

Each court—federal and state—had jurisdiction of the suit brought before it, and, he concluded:

> The rank and authority of the courts are equal, but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law, based upon necessity; and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions *in rem*, and does not exist in actions *in personam*, involving a question of personal liability only, the rule applies in the former, but does not apply in the latter.

The case was argued by Messrs. William H. Arnold and Frank S. Quinn for the Board of Im-

provement, and by Mr. James B. McDonough for the Construction Company.

Practice.—Appeal to Supreme Court

A further appeal to the Supreme Court cannot be taken after an unsuccessful appeal to the Circuit Court of Appeals on a jurisdictional question alone, upon which the suitor might have appealed directly to the Supreme Court.

Ohio ex rel. Seney v. Swift & Co., Adv. Ops. 31, Sup. Ct. Rep. 22.

Allen J. Seney, prosecuting attorney of Lucas County, Ohio, instituted proceedings in a state court against Swift & Company and the Northern Refrigerating Company, charging defendants with violating certain Ohio laws in respect to stored pork products. Swift & Company, alleging that the Refrigerating Company was not a necessary party, asked removal of the cause to the United States District Court on three grounds, among them that the parties were citizens of different states. Seney moved to remand the cause to the state court, the motion was denied, Seney refused to litigate the merits, and after Swift & Company had introduced evidence, final judgment was entered dismissing the complaint. Seney appealed to the Circuit Court of Appeals for the Sixth Circuit, relying only on the jurisdictional question. This court held that the diversity of citizenship was a good ground for the removal, and affirmed the judgment. Thereupon this appeal was prosecuted, the relator again relying on the jurisdictional question alone. The Supreme Court held that it could not entertain the appeal and dismissed the case.

Mr. Justice McReynolds delivered the opinion of the Court. He said:

> After final judgment in the district court, other defenses have been waived, the cause might have come here by direct appeal upon the jurisdictional question only. . . .
>
> The district court's jurisdiction depended upon the substantial grounds alleged in the petition for removal. (Citing case.) Without traversing the facts alleged therein, the relator has always maintained that none of such grounds was good. . . . Generally, at least, suitors may not maintain a position here which conflicts with that taken below; and the only point now open, in any view, is that the claim of diverse citizenship lacks substantiality.

After referring to the section of the Judicial Code defining the jurisdiction of the circuit courts of appeals, and the section providing for direct appeal from district courts to the Supreme Court in certain cases, he continued:

> The Act of March 3, 1891 [26 Stat. at L. 826, chap. 517], from which these sections take their origin, has been uniformly construed as intended to distribute jurisdiction among the appellate courts, prevent successive appeals, and relieve the docket of this court. If appellant, in the way now attempted, can secure two reviews of a cause wherein he has presented to the court below no controverted question except the jurisdictional one, a fundamental purpose of the statute will be frustrated. (Citing cases.)
>
> And we accordingly hold that whenever the suitor might have come here directly from the district court upon the sole question which he chose to controvert in the circuit court of appeals, the judgment of the latter becomes final and we cannot entertain an appeal therefrom.

Mr. Allen J. Seney argued the case in his own behalf, and Mr. Harold W. Fraser argued the case for Swift & Company.

Practice.—Federal Equity Rules

The provision of Equity Rule 30 that the answer must state any counterclaim arising out of the transaction applies only to counterclaims of an equitable nature.

American Mills Co. v. American Surety Co., Adv. Ops. 162, Sup. Ct. Rep. 143.

The Mills Company sued the Surety Company in state courts of Georgia and Illinois upon defendant's guaranty of the performance by the Hartenfeld Bag Company of its contract with the Mills Company. This contract recited that the Mills Company had paid in advance to the Bag Company $22,100 for certain merchandise to be delivered. The fact was, however, that the appearance of such an advance had been given by an exchange of checks and hence the contract was fraudulent. The Surety Company, before appearing in the Georgia or Illinois courts, filed this suit in a New York state court seeking to cancel the guaranty because of fraud. The Mills Company then removed the cause to the equity side of the District Court for the Southern District of New York, and filed an answer and counterclaim in which it denied the alleged fraud and pleaded as a distinct defense that the Surety Company had an adequate remedy at law by setting up the alleged fraud to the suits in the state courts. The answer also set up as a separate counterclaim the liability of the Surety Company on the guaranty and asked judgment against the plaintiff for $21,050 with interest. After motions by the Mills Company to dismiss on the ground that plaintiff had an adequate remedy at law had been denied, the cause came on for trial and the Surety Company proved the fraud. Thereupon the court entered a decree canceling the guaranty, holding that the defendant had waived its defense that there was an adequate remedy at law. There was no question but that the Surety Company had an adequate remedy at law, but it was admitted that the Mills Company had waived this defense by prosecuting its counterclaim to an affirmative judgment, unless—and here lay the question for decision—the Mills Company was required to state the counterclaim by Equity Rule 30. This provides:

> The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross claims.

The District Court and than the Circuit Court of Appeals for the Second Circuit held that this section did not prevent the prosecution of the counterclaim from operating as a waiver, and when the case came on certiorari to the Supreme Court the decree canceling the guaranty was again affirmed.

The CHIEF JUSTICE delivered the opinion of the Court. He said in part:

> The new Equity Rules were intended to simplify equity pleadings and practice by limiting the pleadings to a statement of ultimate facts without evidence, and by uniting in one action as many issues as could conveniently be disposed of. But they normally deal with subjects matter of which, under the dual system of law and equity, courts of equity can properly take cognizance. They certainly were not drawn to change in any respect the line between law and equity as made by the Federal statutes, practice and decisions when the rules were promulgated. By the construction which appellants would put upon Rule 30, it is an attempt to compel one who has a cause of action at law to bring it into a court of equity and then try it without a jury whenever the defendant in

that cause can find some head of equity jurisdiction under which he can apply for equitable relief in respect of the subject matter. The order of procedure, as between the law and equity sides in such cases, always has been that the equity issue is first disposed of by the chancellor, and then, unless that ends the litigation, the original plaintiff may have his action at law and his trial by jury secured him by the 7th Amendment of the Constitution. (Citing case.) Appellant's construction of Rule No. 30 would deny the successful defendant in the equity action this right. Appellant seeks to avoid the dilemma by the suggestion that the rule would be satisfied by merely pleading the action at law without proving it; but this would be futile. The counterclaim referred to in the first part of the paragraph must therefore be an equitable counterclaim—one which, like the set-off or counterclaim referred to in the next clause, could be made the subject of an independent bill in equity. . . .

The result is that the appellant, as defendant, was not obliged to set up and prove his action at law under Rule 30, and when he did so, by his affirmative action, he waived his previous objection to the equitable jurisdiction and also his right of trial by jury.

The case was argued by Mr. Henry Uttal for the Mills Company and by Mr. William Marshall Bullitt for the Surety Company.

Practice.—Service of Process in Copyright Cases

In suits for infringement of copyright, jurisdiction over a corporate defendant is not acquired by service on its president while temporarily in a federal judicial district in which defendant has no place of business.

Lumiere v. Mae Edna Wilder, Inc., Adv. Ops. —, Sup. Ct. Rep. —.

The Copyright Act provides that suits for infringement of copyright "may be instituted in the district of which the defendant or his agent is an inhabitant, or in which he may be found." Lumiere, a citizen and resident of New York City, in the Southern Federal District of that State, there instituted such a suit against a publishing company with its place of business in the Western District. It had no offices of any sort in the Southern District, and no agent authorized to transact business for it there. Service was had on its president, temporarily in New York City, and apparently not on the business of the company. The defendant, appearing specially, moved to quash the service, the motion was granted, and on appeal to the Supreme Court the judgment was affirmed.

Mr. Justice Brandeis delivered the opinion of the Court. The following is the core of the opinion:

> The contention here is that jurisdiction was obtained over the defendant because its president is an agent within the meaning of the statute and was personally found in New York City. If such facts are sufficient to give jurisdiction, a suit upon a copyright may be brought in any district in the United States in which one who is an officer or an agent of a defendant is served with process; although neither plaintiff nor defendant has his residence or place of business there, and although the copyright was not infringed there. It is not to be lightly assumed that Congress intended such a thing. (Citing cases.)
>
> Ordinarily a civil suit to enforce a personal liability under a federal statute can be brought only in the district of which the defendant is an inhabitant. Judicial Code, Section 51. In a few classes of cases, a carefully limited right to sue elsewhere has been given. In patent cases it is the district of which the defendant is an inhabitant or in which acts of infringement have been committed and the defendant has a regular and established place of business. (Citing cases.) In cases under the anti-trust laws, it is where the defendant "resides or is found or has an agent;" . . . and in the case of corporations, the "district whereof it is an inhabitant" or "any district wherein it may be found or transacts business . . . It is not reasonable to conclude that Congress intended in copyright cases to give a right far greater than these. Agent is a word used in the law in many senses. What it means in a statute is to be determined from the context and the subject matter. The president of a business corporation is, commonly, authorized to represent it for many purposes; and it may often be said properly that he is acting as its agent. But induction into office does not impress upon a person the status of agent of the corporation, so that he must be deemed its agent in every jurisdiction which he happens to enter, although the corporation transacts no business there and he is not there in any other way representing it. The service of process made upon Mr. Adkin was, clearly, not service upon any agent of the corporation within the meaning of the Copyright Act.

Argued by Mr. F. F. Church for appellee and submitted by Mr. W. S. Evans for appellant.

Practice.—Service of Process, Jurisdiction

The overruling by a state court of a motion to set aside service of process does not prevent a Federal court, on removal, from passing upon the question.

Section 51 of the Judicial Code requiring civil suits to be brought in the district court of the district where defendant lives, does not prevent a non-resident from removing a proper case to the district court.

A suit to enjoin consolidation of railroad companies as violative of the Sherman and Clayton Acts cannot be entertained by a state court, and this want of jurisdiction is not cured by removal to a Federal court.

Other points of practice passed upon and decided.

General Investment Co. v. Lake Shore & Mich. So. Ry. Co., Adv. Ops. 107, Sup. Ct. Rep. 106.

Suit was brought in an Ohio state court by a stockholder in the New York Central and Hudson River Railroad Company and in the Lake Shore and Michigan Southern Railway Company against those two railroad companies and nine others, to enjoin a proposed consolidation of these lines as violative of the federal Anti-Trust Acts. The Lake Shore Company was duly served; there was purported service on the New York Central Company, but the other defendants neither appeared nor were served. The New York Central Company appeared specially to challenge the validity of the service upon it, but was unsuccessful. Over the objection of plaintiff, the suit was removed to the District Court for the Northern District of Ohio. In this court the New York Central again objected to the purported service, and was here successful; the District Court set aside the service. The Lake Shore Company made a motion to dismiss the suit on the ground that the New York Central was an indispensable party, and this was sustained. Upon appeal to the Circuit Court of Appeals for the Sixth Circuit the rulings of the District Court were largely upheld, but the upper court reversed the decree as to parts of the bill to which that court thought the Lake Shore Company the only necessary defendant. When the case was again in the District Court, the Lake Shore Company moved the bill be dismissed on the ground that the plaintiff had no right to ask in a state court for an injunction against violations of the Sherman or Clayton Acts, and on the further ground that in so far as the bill was directed against violations of state constitutions or laws it showed no right in equity to the relief sought. The motion was sustained and the appeal dismissed. The Circuit Court of Appeals affirmed the decree, and on further appeal to the Supreme Court the decree was affirmed with modifications.

Mr. Justice Van Devanter delivered the opinion of the Court. After stating the facts he took up in order the rulings challenged by plaintiff's appeal. As regards the setting aside of the purported service on the New York Central Company, he said:

> While the state court considered the objection to the service and overruled it before the removal, this was not

an obstacle to an examination of the question by the District Court after the removal. The state court's ruling was purely interlocutory, and its status in this regard was not affected by the removal. Being interlocutory, it was subject to reconsideration and would continue to be so up to the passing of a final decree. Had the cause remained in the state court the power to reconsider would have been in that court, but when the removal was made the power passed with the cause to the District Court. Of course, in the latter the ruling was to be treated with respect, but not as final or conclusive.

From the evidence it clearly appeared that the company was not doing business in Ohio, and hence the learned Justice held that the purported service was rightly set aside.

Plaintiff contended that even if the service was defective, the company had waived the defects and submitted to the jurisdiction of the court. But the learned Justice did not sustain this contention. In petitioning for removal, the company expressly reserved all questions of service and jurisdiction. Besides,

> It is well settled that a petition for removal, even if not containing such a reservation, does not amount to a general appearance, but only a special appearance, and that after the removal the party securing it has the same right to invoke the decision of the United States court on the validity of the prior service that he has to ask its judgment on the merits.

He also held that a stipulation bringing before the District Court evidence presented in the state court did not amount to such waiver and submission, because the company had qualified its use so as to make the evidence available only on the hearing on the question of the validity of the service. He likewise declined to hold that the use of the words "Solicitors for Defendants," in a brief filed in opposition to the motion to remand, amounted to an appearance by the company.

After the removal to the District Court, that court had overruled a motion by plaintiff to remand the suit to the state court, and the correctness of this ruling was next taken up by Mr. Justice Van Devanter. This motion was made on the ground that as the New York Central Company was not an inhabitant of Ohio, the suit could not have been originally brought in the District Court for that district and so could not be removed into it from a state court. This argument proceeded from a consideration of Section 51 of the Judicial Code which deals with venue, and provides that no civil suit shall be brought in any district court against any person by any original process in any other district than that whereof he is an inhabitant, and of Section 28, which deals with removals from state courts of civil suits "of which the district courts of the United States are given original jurisdiction." Referring to Section 51, the learned Justice said:

> This restriction, as repeatedly has been held, does not affect the general jurisdiction of a District Court over a particular cause, but merely establishes a personal privilege of the defendant, which he may insist on, or may waive, at his election, and does waive, where suit is brought in a district other than the one specified, if he enters an appearance without claiming his privilege. (Citing cases.)
>
> It therefore cannot be affirmed broadly that this suit could not have been brought against the New York Central Company in the District Court for the Northern District of Ohio, but only that it could not have been brought and maintained in that court over a reasonable objection by the company to being sued there.

Section 24 is the section which limits the original jurisdiction of District Courts to matters involving over three thousand dollars and arising either under federal laws or between citizens of different states. But it was plaintiff's contention that to be removable from a state court a suit must not only satisfy the requirements of Section 24, but must also be one which under Section 51 could be brought, over defendant's objection, in the District Court for the particular district within which it is pending in a state court To this the learned Justice replied:

> We think the contention runs counter to both the letter and spirit of the statute.
>
> Section 24 contains a typical grant of original jurisdiction to the District Courts in general of "all suits" in the classes falling within its descriptive terms, save certain suits by assignees of particular choses in action. Section 51 does not withdraw any suit from that grant, but merely regulates the place of suit, its purpose being to save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district, or wherever found. Like similar state statutes, it accords to defendants a privilege which they may, and not infrequently do, waive.
>
> Coming to the removal section (28), it is apparent that the clause, "of which the district courts of the United States are given original jurisdiction," refers to the jurisdiction conferred on the District Courts in general, for it speaks of them in the plural. That it does not refer to the venue provision in 51 is apparent, first, because that provision does not except or take any suit from the general jurisdiction conferred by 24; next, because there could be no purpose in extending to removals the personal privilege accorded to defendants by 51, since removals are had only at the instance of defendants, and, lastly, because the venue on removal is specially dealt with and fixed by 29.

Further reasons in support of this result were adduced, and a number of authorities examined and reconciled therewith.

The fourth ruling reviewed was the refusal by the District Court to direct special service under Section 57 of the Judicial Code. On this point the learned Justice said:

> Obviously the section is confined to suits which are local in the sense of relating directly to specific property, real or personal, within the district of suit or partly therein and partly in another district of the same State. This suit was not within that category. It was not brought to enforce a claim to or lien upon specific property so located, not to cancel an incumbrance or lien thereon, not to remove a cloud upon the title. On the contrary, as the original bill plainly disclosed, it was brought to enjoin two railroad companies—one having lines both within and without the State in which the suit was begun, and the other having lines without that State—from consolidating, along with nine other companies, into a single corporation. Such a suit is essentionally *in personam* and strictly transitory, and is not made any the less so by including in the bill, as was done here, an incidental prayer that the consolidation be annulled if consummated pending the suit.

Eight months after the suit was started the plaintiff asked leave to file a supplemental bill and to make new parties, so that plaintiff would be suing on behalf of the Lake Shore Company and in order to obtain a nullification of the effects of the consolidation, which had meantime taken place. In holding that the District Court had not abused its discretion in denying the leave asked, the learned Justice said:

> An application for leave to file a supplemental bill is addressed to the discretion of the court, and the ruling thereon will not be disturbed on appeal unless the discretion has been abused. Under Equity Rule 34 the office of a supplemental bill is to introduce matters occurring after the filing of the original bill, or not then known to the plaintiff. Much more was attempted by the supplemental bill tendered in this instance. By it, as we have shown, the plaintiff sought to shift the right in which it was suing and to change the character and object of the suit.

When the case was first before the District Court a motion to dismiss the suit was sustained on the

ground that the New York Central was a necessary party. On appeal, the Circuit Court reversed this ruling as to part of the bill, and plaintiff now contended that this partial reversal amounted to an adjudication of the sufficiency of so much of the bill as fell within the reversal, and that hence the District Court, when the case again came before it, could not consider its sufficiency. This contention also did not accord with the view of the Supreme Court, because the second motion to dismiss was based on different objections to the bill. After making this clear, the learned Justice turned to a consideration of the objections themselves. As to whether the New York Central Company was an indispensable party, he said as follows:

> As to so much of the bill as sought to enjoin the New York Central Company from voting its shares in the Lake Shore Company and to enjoin the latter from permitting it to vote them, we think it is obvious that the New York Central Company was an indispensable party, and that with it neither appearing nor reached by an effective process no other course was open than to dismiss that part of the bill. (Citing cases.)
>
> As to so much of the bill as sought to enjoin the Lake Shore Company from entering or consummating the proposed consolidation, the New York Central Company plainly was not an indispensable party. Its stockholding interest in the Lake Shore Company did not make its presence essential, its status in this regard being merely that of the stockholders in general. Nor did its participation in the agreement for the consolidation give it any right which required that it be brought in. At best the agreement was not to be effective unless and until ratified by the stockholders of the several companies. It had not been ratified by the stockholders of the Lake Shore Company and they were under no obligation to ratify it.

He next considered the right of plaintiff to sue under the Anti-Trust Acts, and the question as to whether such right could be enforced in a state court. The present suit, he made clear, could not have been maintained under the Sherman Act alone. The learned Justice quoted the sixteenth section of the Clayton Act, and continued:

> This section undoubtedly enlarges the remedies provided in the Sherman Anti-Trust Act to the extent of enabling persons and corporations threatened with loss or damage through violations of that Act to maintain suits to enjoin such violations, save in the instances specified in the proviso. This right to sue, however, is granted in terms which show that it is to be exercised only in a "court of the United States." This suit was brought in a state court, and in so far as its purpose was to enjoin a violation of the Sherman Anti-Trust Act that court could not entertain it. The situation was the same in respect of the purpose to enjoin a violation of the Clayton Act.
>
> When a cause is removed from a state court into a Federal court the latter takes it as it stood in the former. A want of jurisdiction in the state court is not cured by the removal, but may be asserted after it is consummated. (Citing cases.)
>
> It follows that so much of the bill as based the right to relief on asserted violations of the Sherman Anti-Trust Act and the Clayton Act was rightly dismissed; but the dismissal, being for want of jurisdiction, should have been without prejudice.

Finally it was held that the bill failed to show a right to relief in equity because of infractions of state constitutions and laws. The learned Justice quoted with approval an excerpt from the opinion of the Circuit Court of Appeals, containing the following words:

> "We have, then, a case where a private suitor, with a minimum of ponderable interest, and with no disposition to beware of entrance to a quarrel, is seeking relief upon the sole ground that the public policy of the state is being violated, and where the state authorities have long acquiesced and do acquiesce in any violation there may be. Under such circumstances, the court of equity will be strict in requiring the plaintiff to point out with precision and certainty in what respects the law is about to be violated and to show, clearly and positively, substantial and irreparable injury to its private rights. A measure of imperfection in pleading that might well be overlooked in the ordinary controversy should not be disregarded in such a case as this."

The case was argued by Mr. Frederick A. Henry for plaintiff stockholder and by Mr. Walter C. Noyes for the railroad companies.

Practice.—Removal of Causes

Section 51 of the Judicial Code requiring civil suits to be brought in the district court of the district where defendant lives, does not prevent a non-resident from removing a proper case to the district court.

Lee v. Chesapeake & Ohio Ry. Co., Adv. Ops. 256, Sup. Ct. Rep. 230.

In this case the decision of the Court in regard to the effect of Section 51 of the Judicial Code on the removability of causes, announced in *General Investment Co. v. Lake Shore & Mich. So. Ry.*, reviewed *supra*, was reaffirmed, and earlier conflicting cases reconciled, distinguished, or expressly overruled.

The point was the only one involved. A citizen and resident of Texas brought suit in a Kentucky state court against a corporate citizen and resident of Virginia. Defendant removed the case, because of diversity of citizenship, to the District Court of the United States for the Eastern District of Kentucky. Plaintiff then moved that the cause be remanded to the state court on the ground that the District Court was without jurisdiction in that neither party was a resident of that district. The court overruled the motion, plaintiff elected to stand on the motion, and on writ of error to the Supreme Court judgment entered for defendant was affirmed.

Mr. Justice Van Devanter delivered the opinion of the Court. He quoted Section 51 of the Judicial code, on which plaintiff relied, and which provides that where Federal jurisdiction is founded upon the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant, and then said:

> It is a necessary conclusion from repeated decisions, going back to the original Judiciary Act of 1789, that this provision does not limit the general jurisdiction of the District Courts or withdraw any suit therefrom, but merely confers a personal privilege on the defendant, which he may assert, or may waive, at his election, and does waive if, when sued in some other district, he enters an appearance without claiming his privilege. (Citing cases.)

After quoting from the General Investment Co. case, and other cases, he said (referring to the removal section):

> It will be perceived that the right of removal under section 28 arises whenever a suit within the general jurisdiction of the District Courts is begun in "any" state court, and also that the party to whom the right is given is designated in direct and unequivocal terms. Where the suit arises under the Constitution, or a law, or treaty of the United States the right is given to "the defendant or defendants" without any qualification; and as to "any other suit" it is given to "the defendant or defendants," if he or they be "non-residents of that State." In neither instance is the plaintiff's assent essential in any sense to the exercise of the right. Nor is it admissible for him to urge that the removal be into the District Court for some other district, for it is his act in bringing the suit in a state court within the particular district which fixes the venue on removal.
>
> Applying these views to the present case, we hold that it was removable, that it was duly removed into the District Court for the proper district and that the motion to remand was rightly denied—in short, that the District Court had jurisdiction to proceed to a determination of the cause.

The learned Justice then considered a number of

earlier cases, and the case of *Ex parte Wisner*, 203 U. S. 449, was definitely overruled.

The case was argued by Mr. Allan D. Cole for the plaintiff and by Mr. E. L. Worthington for the railroad company.

Practice.—Federal Jurisdiction, Amount Involved

In determining whether the requisite amount is involved to give a federal court jurisdiction of a suit concerning the installation of a private railroad siding, the cost of future maintenance should be included.

The Western & Atlantic R. R. v. R. R. Commission of Georgia, Adv. Ops. —, Sup. Ct. Rep. —.

The first opinions of the Supreme Court written by Mr. Justice Butler were among those handed down on February 19th. One of them is here reviewed.

Plaintiff railroad brought suit against the Railroad Commission of Georgia to enjoin the enforcement of an order of the Commission requiring the railroad to maintain a private siding at a warehouse. Defendant's answer denied that the amount in controversy exceeded $3,000, as required by Section 24 of the Judicial Code, defining the general jurisdiction of District Courts. The District Court for the Northern District of Georgia sustained defendant's contention and denied the application for an injunction. Upon appeal to the Supreme Court the order declining jurisdiction was vacated with directions for further proceedings.

Mr. Justice Butler delivered the opinion of the Court. He said:

> The decision in the District Court states:
> The propriety of requiring the construction of this particular track is alone in issue. The cost in material and labor is stated in the petition to be but $1260, and this amount alone is involved. . . .
> The cost of future maintenance is not involved now because that is an incident of the future use. The maintenance cost for some years will be slight, and if the business done over the track does not justify its maintenance, the question of its abandonment will be open then.

This appraisal of the amount at stake did not commend itself to the approval of the Supreme Court. The learned Justice said:

> We are unable to agree that the cost in material and labor is all that is involved in this case. Plaintiff seeks to be relieved not only from constructing the side track but also from maintaining it in suitable condition for use, and from the cost and expense of using and operating it for the movement of cars to and from the warehouse. The value of all these is involved. (Citing cases.) It is shown that the permanent annual burden on account of interest on such cost, depreciation, maintenance and operating expenses of such side track will exceed $200, and this capitalized at a reasonable rate exceeds $3,000. Laying aside other considerations bearing upon the matter, the amount is shown to be sufficient. This being so, the District Court should have taken jurisdiction and should have proceeded to determine the merits of plaintiff's application for a temporary injunction, which it did not do.

The case was argued by Mr. Fitzgerald Hall for appellant.

NOTE: In *Portsmouth Harbor Land & Hotel Co. v. United States*, Adv. Ops. 131, reviewed in the February number, names of counsel were not given. The case was argued by Mr. Chauncey Hackett for the hotel company and by Solicitor General Beck for the United States.

SOUTH CAROLINA'S UNIQUE MARITAL STATUS

State's Judicial and Legislative Policy of No Divorce Is of Ancient Recognition and Contrasts Curiously with Its Sanction of Common Law Marriages as Reiterated in a Legislative Act in 1911—Legal Complications Arising from Anomalous Situation

By HON. S. M. WOLFE
Attorney General of South Carolina

SO much has been said and written in recent years on the subject of divorce, and especially since the women of our country have been accorded the right of suffrage, that it has occurred to me that it would be a matter of more than ordinary interest to the public so concerned, to have presented an article, not over-technical but enough so to make it of legal value, on the unique status of the marital relationship in South Carolina. For wherever the discussion has arisen, whether upon the rostrum of the chatauqua, in the newspapers, in the magazines or in the forums of our literary clubs, this state has been conspicious as an exception to all rules and traditions thereto appertaining.

No divorce. Of all the civilized political powers and principalities, of all their states or other subdivisions on the face of the earth, this is the only one of which this is true. And in the state's judicial and legislative polity, this anomaly is of ancient recognition. Perhaps it derives its source from the old conception of marriage as a covenant.

In a foot note to the case of Vaigneur versus Kirk (2 Des., 644) the eminent Chancellor Desaussure said: "No divorce has ever taken place within the state. The legislature has steadily refused to grant divorce, on the ground that it was improper for the legislative body to exercise judicial powers; and it has as steadily refused to enact any law authorizing the courts to grant divorces a vinculo matrimonii." This dictum was given expression in the year 1808. This case involved the legitimacy of one Nicholas Winkler, Junior. In the annotated edition of these reports by the West Publishing Company of St. Paul we find in the foot-notes to this case this editorial comment:

> The subject of marriage and, consequently, the legitimacy of children, is on the same loose footing in this state that it was in England before the statute of 26 George 2, ch. 33, and as it is now in Scotland. We have no statute regulating marriages or providing any form for the celebration of them or for recording them. And they are usually celebrated in any form the parties please, before a clergyman or magistrate. We must therefore resort to the law as it stood in England prior to the statute above mentioned to ascertain what constitutes a legal marriage and the legitimacy of children in this country. That law is well

stated by Mr. Blackstone in his Commentaries, I Vol. Chap. 15, p. 433.

Sir William Scott has summed up the law of Scotland on the subject to be: (1) That it is a civil contract regulated by law and endowed with civil consequences to which, in most countries, the sanction of religion has been superadded. (2) That even though erected into a sacrament by the Roman Catholic Church, the contract fell naturally into the category of those of civil origin and that it had the full essence of matrimony without the intervention of the priest.

So in South Carolina, contrasted with the position of rendering the dissolution of marriage a matter difficult, if not impracticable, the courts, proceeding upon the theory that "consensus non concubitus facit matrimonium," have declared that to constitute man and woman "married" it is required that they "agree in the present tense to be such."

The framers of the Constitution of 1868 evidently felt that the situation needed a remedy and ventured an opening wedge by Section 5, Article XIV; wherein was provided that "Divorces from the bonds of matrimony shall not be allowed but by the judgment of a Court, as shall be prescribed by law." Following this, the general assembly enacted a statute (15 Stats. p. 30) allowing divorce upon the ground of adultery. This act was repealed in 1878 (16 Stats. 719), thereby restoring the former status till 1822, when, by a subsequent act, the legislature conferred upon the court of Common Pleas authority to annul the marriage where there is shown to have been a want of contractural capacity or mutual consent at its inception, or where the contract has not been consummated by the "cohabitation of the parties." This is the statutory law of the state at present. (Sec. 3750, Vol. 3, Code 1922). In the case of Dawson v. Torre, et al, (116 S. C. at p. 346, decided at the October term, 1919) Mr. Justice Fraser writing the opinion for the State Supreme Court said: "Marriage is frequently spoken of as a contract but it is not. It has no element of a contract. It is a status. A man and a woman may contract to assume the status of marriage." Hence we have the possibility of further confusion by virtue of this distinction.

In the case of the State v. Duncan (110 S. C. at p. 255, decided April term, 1918) the Supreme Court said: "In no case will the divorce be recognized unless the defendant has been personally served in the state in which the divorce is granted, thereby conferring jurisdiction of the court over the party whose rights are sought to be affected. The courts of Georgia could not grant the divorce against Mrs. Duncan unless she was personally served in the state of Georgia. A service by publication was not sufficient in the case of McCreery v. Davis, 44 S. C. 198." In the Duncan case the defendant was convicted of adultery. He pleaded by way of defense, a divorce from his first wife. He appealed and the Supreme Court affirmed the judgment for the reasons above stated.

In the case of the State v. Westmoreland (76 S. C. 145), the case turned upon a question of whether or not the moving party in the alleged divorce proceedings had acquired in good faith his residence in the state in which the proceedings were brought.

It was shown by the prosecution that the defendant had not relinquished his business and property interests in South Carolina during the time of his alleged "residence" in the state of Georgia, and that he had not as a matter of fact acquired his bona fide residence there when the decree of divorce was granted, and his conviction on the charge of adultery was sustained.

In the case of McCreery v. Davis (44 S. C. 195), one McCreery in the year 1885, a citizen of South Carolina, was married to a lady citizen of Brooklyn, New York. After their marriage the couple lived until 1887 in South Carolina. The marriage "status," at least, was terminated in that year by the absconding of the irate wife, who took up her abode in Illinois and who soon thereafter instituted her proceedings for a divorce absolute. McCreery was not served personally with process but was served by "publication." That is, he was served by publishing the "summons" in some newspaper published in the jurisdiction of the court in Illinois, which is the customary practice in civil suits in the case of absent defendants.

In 1893 McCreery and one Davis entered into a contract: Davis to purchase and McCreery to convey "free of incumbrance" a certain tract of land. Davis declined to accept title when it was tendered, claiming that McCreery's "divorced" wife had an inchoate right of dower in the property and that it constituted a "lien."

In an action for specific performance and on appeal, the claim was sustained, the court holding that the "divorcing" court in Illinois had failed to acquire jurisdiction of the defendant inasmuch as the publication of summons was ineffectual, and that therefore the alleged divorce was not recognized in South Carolina, and Mrs. McCreery still had her inchoate dower right in her former husband's real estate situated in this state.

Dower may be renounced "freely and voluntarily in writing and upon a private and separate examination," but otherwise to defeat the wife of her dower she must elope and for five years thereafter continue with her advoutrer, and not return and become rehabilitated with her husband; or she must obtain a valid divorce; or be convicted of adultery, and even in this last event the husband must have refused and, in effect, declined to condone the offense, otherwise she will have been restored to her *status quo ante*.

An act of the General Assembly in 1911 prescribes that it shall be unlawful for any persons to contract matrimony without first procuring a license, but the same act provides that an absence of a license to marry does not render the marriage illegal. Thus we have again a reiteration of legislative sanction of the "Common Law" marriage, in South Carolina, and a striking illustration of the state's utter inconsistency in her attitude toward the marriage relationship. In one breath she is Freudist; in another, she is *Canonist*. The statute says "contract"; the courts say "status." Whether a man is married or not married; whether a divorce is valid or not valid; whether a dower is in reality a dower; whether a child is legitimate or illegitimate, within her jurisdiction, is in each instance a matter subject to judicial investigation and determination. Even though the wife by her infidelity and disloyalty may divest herself of her dower, on the one hand the law says she is not the "wife" of her husband, yet on the other the husband is bound to have this one woman, so long as she survives, preclude his acquiring a similar "status" legally with another. To such a degree of infallibility and loyalty does the law in South Carolina hold a husband to his wife. But whether we go back to Adam or back to the Council of Trent, through the medium of a national law or otherwise, we should approach, if not secure, a greater uniformity and stability for the law of marriage.

PROBLEMS OF PROFESSIONAL ETHICS

RESERVING, if we may, the liberty of returning later to the subject, we here advert briefly to the report, published in the February number of the JOURNAL, of the American Bar Association Committee on Judicial Ethics of date January 1, 1923.

That Committee submits a draft of proposed canons of judicial ethics, thirty-four canons in all. Assuming as we do that judicial ethics is a department, and a most important department, of "legal ethics," we desire, with profound respect for the distinguished Committee which has framed the draft, to make a few suggestions.

In the first two canons, concerning "Promises of Candidates" (for the judiciary) and "Relations of the Judiciary," candidates are admonished not to appeal to the cupidity or prejudice of the appointing or electing power; not to announce in advance their conclusions of law on disputed issues in order to secure class support; and to do nothing to create the impression that if chosen they will administer their office with bias, partiality or improper discrimination. It is also said (canon 2) that the office of judge casts upon the incumbent duties in respect of his personal conduct concerning his relation to state, litigants, the law and practitioners of law and witnesses, jurors and attendants.

This, of course, is all sound and true; but the query arises whether it is not so clear and undisputed that it does not need to be embodied in a code, and whether the assumption of the need of this admonition is not an affront to the judiciary. In any event, cannon 2 does not seem helpful; for it merely states that a personal relation exists. This is a matter of common knowledge, and offers no guiding principle as to conduct.

Moreover, candidates for judicial honors are thought to violate the ethics of the bench far more frequently and persistently by way of political activities involving appeals for campaign contributions and "indorsements" than by appeals to cupidity or prejudice; or by indications that a candidate, if elected, will be biased or partial or will improperly discriminate among litigants and lawyers. Thus, even if canons one and two should stand as drafted, it is felt that the political activities of aspirants for the bench, whether by way of original election or re-election should be controlled—at least so far as a plain statement advocated by the American Bar Association can control them. We therefore venture to reprint a suggestion founded on a letter of Honorable Russell Benedict, one of the Justices of the Supreme Court of New York, which appears in the April, 1922, issue of the JOURNAL. The suggestion is found at page 300 of the May issue.

Mr. Justice Benedict is not responsible for the paragraph as a whole; but in preparing it, his letter was found most stimulating. The paragraph follows:

> *Political Activity*—A judge should not take an active part in politieal campaigns, either by activity at the polls, appearing on the platform at political meetings for the discussion of partisan issues, or by endorsing candidates, whether judicial or otherwise. Nor should he, in any other way, for himself or another, publicly seek to influence elections of a partisan character. He should not personally or through emissaries urge his own endorsement for judicial office upon members of the bar or others. Of course his friends and supporters may do this; but the judge, or the candidate for the bench, should abstain from any active participation in his own nomination, election or appointment, either personally or through urging his friends to "work for him." When he consents to stand for election or reelection as judge, he sufficiently indicates that in his own opinion he is able to perform the duties of the office he seeks; and the question whether any other candidate is better equipped for the office is one he should leave to the determination of the electors, or of the appointing power.

It is also to be hoped that before a draft of a code of judicial ethics shall have been finally adopted, the association will give its attention to the very considerable funds subscribed and paid by lawyers and others to promote the candidacy of judges. Furthermore, the matter of solicitation of lawyers, not merely for funds, but for "indorsement," either of a candidate on his first efforts to be elected or appointed to the bench, or in his struggles for re-election, should be taken up and dealt with.

Of course such candidates are themselves frequently assessed, sometimes heavily, by way of political contributions to enable their party to elect them and others. While this is a mischief, yet it does not rise to the proportions of a scandal; for it is the candidate's own money which is involved. But to call upon lawyers or knowingly to allow lawyers to be called upon for money or endorsement involves candidates at once in an unjudicial act. To those who subscribe or endorse, the candidate is naturally beholden. Those who refuse, whether through poverty, or disapproval of the candidate, or for any other reason, are likely to feel that their standing with the judge, if elected, may be unfavorably affected.

In any event, is it not of great importance to lay down guiding comprehensive principles which will commend themselves as reasonable, but which will set some bounds to political activity on the part of aspirants for judicial office and their friends?

Canon 29 of the Draft, "Partisan Politics," is by no means overlooked. It deprecates a judge's actively promoting the interests of one political party against another, making political speeches, *contributions to party funds,* or participating in party conventions; also his endorsing political candidates for public office; and is sound and wholesome. It seems, however, as if the political activities of candidates for the bench, whether through election or appointment, and of their friends, should be made the subject of further study and of more detailed and specific statement and control. And if the ideas expressed in canon 1 are to stand, may they not well be embodied in canon 29, or in some single canon, whatever its nuumber, dealing comprehensively with "political activities?"

RUSSELL WHITMAN.

REGULATION OF THE SALE OF SECURITIES IN INTERSTATE COMMERCE

Solution of Problem of Protecting Investor Must Be Effected by System of Publicity Giving Full Information as to Securities to Be Sold and Then Leaving Responsibility of Purchase to Him—Difficulties Confronting Federal Incorporation or Licensing Plan

By Hon. Huston Thompson

Member Federal Trade Commission

SHORTLY after the Armistice was signed, the Federal Trade Commission was called on by the Capital Issues Committee, the Federal Reserve Board and representatives of the Secretary of the Treasury to invoke the Commission's jurisdiction for the purpose of aiding the Treasury Department in preventing the exchange of Liberty Bonds for what has been commonly called "wildcat securities." It was believed that unless something could be done to stop the false representation prevalent in connection with advertising the sale of such "securities," millions of dollars which were going into the purchase of these "securities" would be lost to the Government in the sale of the Victory Loan Bonds.

The Commission, after an exhaustive hearing at which representatives of various Departments of the Government were present, who argued that the Commission had jurisdiction, moved to prevent the sale of securities crossing state lines.

Since that period the Commission has been continually investigating cases of the sales by false representation of such securities. It has issued complaints where it had reason to believe that such representations had been made, and after taking testimony, and holding a hearing on the issues, has ordered offenders to cease and desist from the practices complained of.

Out of the experiences derived from the close touch with this practice, which has been the cause of ever increasing losses to great numbers who could ill afford the loss, the writer has reached the conclusion that legislation could be enacted that would protect the investing public with a minimum amount of interference to legitimate business.

As I see it, the solution must be effected through a system of publicity which shall protect the public by informing the investor as to the securities to be sold by giving the prospective purchaser a full opportunity to be enlightened and then leaving to him the responsibility of purchase.

Legislation conceived and operating along these lines in other countries has proved to be preventive, protective, practical and not paternalistic. There are those, however, who are impatient of this curative process of publicity. They argue that this is only a halfway measure, and insist that the Federal Government should embrace the remedy which it must eventually come to anyway, namely federal incorporation and licensing thereunder.

From my observation of governmental procedure, and I am of course voicing merely my own personal opinion on this whole subject, I am not persuaded that this latter course is practical under our present governmental administration of affairs.

Generally speaking, a Federal incorporating or licensing plan would seem to be impractical for various reasons.

A special and exhaustive study would have to be made of each security that was offered by anyone of the thousands of corporations coming under such an act. There would also have to be a definite stamp of approval by a governmental officer. All this would require a very large and unwieldy staff of employees. In addition there would be the investigation and approval of the incorporation papers of thousands of concerns before a certificate could be granted. All of this would necessitate a great expense.

Furthermore, an act of that kind, I believe, would conflict with the inherent power of the individual States to create such corporations having the right thereafter to do business beyond State lines, and might therefore subject itself to the charge of being unconstitutional.

Its tendency would be paternal, thrusting the Government into business far more than it is at this time.

Finally it would fail to solve the problem that confronts the country with respect to the protection of the investing public in that even in the face of such a law, the conscienceless promoter could, after having complied with all of the terms, put on a sale of stock through false advertising just as he does now. When the same came to the knowledge of the public officials, undoubtedly his license would be revoked but that would not bother him any more than when in the present time, he has unloaded a wildcatting stock sale in one state, and leaves for other parts of the country. To revoke his license would be a good example of "locking the barn door after the horse was out."

In the search for proper legislation it would be well to consider the experience of Great Britain, Belgium, and other foreign Governments who have investigated the subject, and to inquire as to the efficacy of foreign laws enacted to meet a similar situation.

Protective Legislation in Great Britain and Belgium

Legislation enacted by the British Parliament on this subject extends over the last three decades. The British Companies Act (Companies Consolidation Act) was passed in 1908, has subsequently been amended, and is now in force. In drafting this Act, the Board of Trade and others who were responsible for the legislation sought to frame a bill which would interfere as little as possible with legitimate business, and at the same time tend to exclude those who were seek-

ing to secure unfairly the money of the investing public.

The situation in England is described as follows in a report printed for the United States Senate Committee on Interstate Commerce[1]:

> The problem before Parliament was, on one hand, the protection of the large body of the public represented in investors and creditors, and on the other hand, to avoid restricting unduly the facilities for the creation and development of corporations, which had contributed so largely to the prosperity of the country and needlessly embarrassing their administration.
>
> Instead of adopting arbitrary rules which in some cases might effectively prevent an abuse but in others seriously interfere with the prosecution of legitimate business, it was deemed sufficient, for the time being at least, to provide for a certain amount of publicity in corporate affairs, enforcing those requirements by penalties, imposed in many cases upon the individuals who knowingly and willfully disregarded them.

So the British law provided among other things that a prospectus, which it defines as "any notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures of a company," must be filed with the registrar of companies, and must show (1) the names and addresses of the vendors, and where there is more than one separate vendor, or the company is a subpurchaser, the amount payable to each vendor; (2) the particulars and the nature and extent of the interest of every director in the promotion of, or property to be acquired by the company; (3) the dates of and parties to every material contract, and a reasonable time and place for the inspection of such contracts; and further, that a company which does not issue a prospectus shall not allot any shares or debentures until a statement in lieu of a prospectus has been filed. A person is deemed a vendor who "has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company."

It also required that the one who was to promote the sale of the securities should file with a public official in detail information of the properties owned and other information which would elucidate the circumstances and business conditions of the issuing company.

The British law in its original form did not require the carrying of information in the prospectus and was therefore subject to criticism by public writers because the law failed to bring the information sufficiently to the notice of the investor. This criticism has, however, apparently been met by the additional requirement of the publicity in the prospectus now prescribed.

Subsequent to the enactment of the British law, Belgium, having for a number of years been used as an Eldorado for the promotion of false securities, began an exhaustive investigation of the question of the protection of its investors. In the course of this investigation legislative committees made a thorough study of the foreign laws and methods of protecting the public.

On May 25, 1913, legislation amending the Belgian Commercial Companies law was enacted. It has been pronounced by a number of international writers to be the best legislation on the subject up to date, and its operation has been declared to be most successful by experts who have watched it closely. It follows in many respects the English law, in that it requires the filing of information with a certain public official by all those announcing and offering securities for public sale. But it goes into much greater detail than the British law, and while quite brief in its form, requires those offering securities for sale to lodge with the Government and to carry in their advertisements, information which will put the responsibility entirely upon the purchaser if he buys after he has had every opportunity to secure the information as to the standing of the company.

It should be noted that both in the English and the Belgian laws very heavy criminal penalties are imposed, of both jail sentences and fines, for those failing to meet the requirements of the statute before they offer their securities for investment.

It should also be noted that these laws do not require every corporation to file the information as required in their respective statutes, but only those who are about to offer their securities for public sale.

To put it briefly, the theory upon which these laws have been enacted was, as was emphasized particularly in the debates on the British law, to shift the doctrine of *caveat emptor* so that instead of letting the buyer beware, to now require the seller to beware. The latter saves himself by filing his information, advertising the same in his prospectus and offering securities which conform to this information. When he has done this and given the investor every reasonable chance to inform himself, the burden then shifts to the investor.

Hughes Committee Recommends the Filing of Statements, but not Official Verification

In 1909, the Honorable Charles E. Hughes, who was then Governor of New York, appointed a committee to inquire what changes, if any, were advisable in the laws of that State, bearing upon speculation in securities and commodities, or relating to the protection of investors. The committee, reporting to the Governor in regard to the New York Stock Exchange, particularly in relation to the subject of the filing of statements with the New York Stock Exchange by companies selling their securities on its floor, said:

> We have given consideration to the subject of verifying the statements of fact contained in the papers filed with the applications for listing, but we do not recommend that either the State or the Exchange take such responsibility. Any attempt to do so would undoubtedly give the securities a standing in the eyes of the public which would not in all cases be justified. In our judgment, the Exchange should, however, adopt methods to compel the filing of frequent statements of the financial condition of the companies whose securities are listed, including ballance sheets, income and expense accounts, etc., and should notify the public that these are open to examination under proper rules and regulations. The Exchange should also require that there be filed with future applications for listing a statement of what the capital stock of the company has been issued for, showing how much has been issued for cash, how much for property, with a description of the property, etc., and also showing what commission, if any, has been paid to the promoters or vendors. Furthermore, means should be adopted for holding those making the statements responsible for the truth thereof. The unlisted department, except for temporary issues, should be abolished.

Publicity the Remedy Recommended by the Hon. Louis Brandeis

The Honorable Louis Brandeis, Associate Justice of the Supreme Court, in his book entitled "Other People's Money," after analysing the results of the Pujo Financial Investigations, and other investigations, and the whole subject of the issuing of securities, said

1. Laws and References concerning Industrial Combinations, etc., Washington, 1913, p. 140.

that publicity was the remedy for the protection of the investing public.

On page 101 of this analysis, he said:

> Compel bankers when issuing securities to make public the commissions or profits they are receiving. Let every circular letter, prospectus or advertisement of a bond or stock show clearly what the banker received for his middleman-services, and what the bonds and stocks net the issuing corporation. That is knowledge to which both the existing security holder and the prospective purchaser is fairly entitled. If the banker's compensation is reasonable, considering the skill and risk involved, there can be no objection to making it known. If it is not reasonable, the investor will "strike" as investors seem to have done recently in England.

Again on page 103:

> The Federal Pure Food Law does not guarantee quality or prices; but it helps the buyer to judge of quality by requiring disclosure of ingredients. Among the most important facts to be learned for determining the real value of a security is the amount of water it contains. And any excessive amount paid to the banker for marketing a security is water. Require a full disclosure to the investor of the amount of commissions and profits paid and not only will investors be put on their guard, but bankers' compensation will tend to adjust itself automatically to what is fair and reasonable. Excessive commissions—this form of unjustly acquired wealth—will in large part cease.

And again on page 104:

> To be effective, knowledge of the facts must be actually brought home to the investor, and this can best be done by requiring the facts to be stated in good, large type in every notice, circular, letter and advertisement inviting the investor to purchase. Compliance with this requirement should also be obligatory and not something which the investor could waive.

Recommendations of the Capital Issues Committee Indorsing the Taylor Bill

During the war, there was created, under the supervision of the Treasury Department, what was known as the Capital Issues Committee. That Committee in its report to Congress on December 2, 1918, (Public Document No. 1487, 65th Congress, Third Session,) and again in their report to Congress on February 28, 1919, (Public Document No. 1836, 65th Congress, Third Session,) vigorously urged the creation of legislation to protect the investing public, and appeared before committees in Congress for the purpose of indorsing what was then known as the Taylor Bill, (House Bill 188, 66th Congress,) providing for the furnishing of information with respect to shares of stock offered to the public, and prescribing penalties.

That bill was drafted along the lines of the British law, requiring the filing of information with a public official, revealing the conditions of a corporation offering to sell its securities in interstate commerce and stating the conditions under which the securities were offered.

When the Taylor Bill was considered by the Judiciary Committee of the House, Congressman Taylor submitted evidence on the part of the States showing a desire and need for a bill to supplement the State laws.

Former President Taft in a message to Congress, January 27, 1910, transmitted to both Houses of Congress, regarding proposed legislation for a Federal Incorporation law, repudiated the idea of a compulsory licensing law, and said on page 20 of his recommendations:

> A federal compulsory license law, urged as a substitute for a federal incorporation law, is unnecessary except to reach that kind of a corporation which, by virtue of the considerations already advanced, will take advantage voluntarily of an incorporation law, while the other state corporations doing an interstate business do not need the supervision or the regulation of a federal license and would only be unnecessarily burdened thereby.

The matter quoted is a digest of that which had already been discussed in the President's report,—i. e., that the kind of a Federal act proposed was voluntary upon those doing an interstate business. Those who did not desire to accept its terms voluntarily could still function in interstate business under the State incorporation laws.

It was apparently former President Taft's idea that the legislation he was referring to would only cover very large corporations commonly known as "trusts." He says, in fact: "Only the largest corporations would avail themselves of such a law, because the burden of complete federal supervision and control that must certainly be imposed to accomplish the purpose of the incorporation would not be accepted by an ordinary business concern."

Difficulty of Administering a Federal Incorporation or License Law

If all corporations doing an interstate business were required to be incorporated or licensed under a Federal law, administration would be very difficult. As I have already suggested, such a law, to protect the investing public, would require a special and exhaustive study of each security that was offered by any one of the thousands of corporations that would have to come under this act, and there would also have to be a definite stamp of approval by a governmental agency.

Suppose a Government official were empowered to pass upon and approve of a security, and thereafter the values behind that security turned out to be worthless, and bankruptcy followed. Would not the responsibility be upon the official, and would not the normal Government officer hesitate to draw the fine line between the sound investment and the unsound? Out of this responsibility and uncertainty would come a natural retarding of the normal development of business, which might involve serious consequences.

On the other hand, suppose he should disapprove of a stock sale, as did the Capital Issues Committee working under the stress of war conditions, and let us suppose that an oil company, having been denied the right to issue stock because a Federal official would not approve of the same, could finance itself in some other way and subsequently should bring in a well of a thousand barrels production daily? Would not that fact shake the confidence of a public official in his judgment? Is it fair to thrust such a duty upon an official or a Governmental department? Is it not better to seek, by all human means possible, to inform the investor and let him take his own risk—a risk which he may well be able and desirous of taking? It is fair to assume that the most difficult thing which confronts the State commission having to do with the protection of investors, is the giving of approval or refusal to securities presented for sale, whether that approval be expressed by a definite stamp or implied by the issuance of a license.

Protecting the Public by Informing the Investor

The British and Belgian legislative bodies, after a thorough investigation, came to the conclusion that the least amount of interference with the greatest amount of protection was the solution of the question of protecting the investing public. It was their idea that the law should be prophylactic and preventive rather than paternal. Invariably the same policy has

(*Continued on Page 183*)

AMERICAN BAR ASSOCIATION JOVRNAL

BOARD OF EDITORS

EDGAR B. TOLMAN, Editor-in-Chief.....Chicago, Ill.
EDGAR A. BANCROFT.....Chicago, Ill.
JUDGE GEORGE T. PAGE.....Chicago, Ill.
CHESTER I. LONG.....Wichita, Kas.
HERMAN OLIPHANT, Literary Editor.....New York, N. Y.
R. E. LEE SANER.....Dallas, Texas

Subscription price to individuals, not members of the Association nor of its Section of Comparative Law, $3 a year. To those who are members of the Association (and so of the Section), the price is $1.50, and is included in their annual dues. Price per copy 25 cents.

Office: 1612 First National Bank Bldg., 38 South Dearborn Street, Chicago, Illinois

THE PRESIDENT'S PROPOSAL

It would be of incalculable value to the United States if the proposal of President Harding that the United States should accept membership in the Permanent Court of International Justice, could be considered on its merits.

It is perhaps beyond reasonable expectation that a question which awakens memories of a great political controversy should not have a tendency to reopen that controversy, and thus result in the injection of extraneous and immaterial issues.

But the members of the legal profession, who by their training and experience have learned to eliminate and reject immaterialities and deal with essentials, ought certainly to be able to view this proposal with a judicial and impartial attitude.

The proposal is that the United States accept the protocol and statute constituting the court, without becoming parties to the League of Nations, and that this be made clear by explicit reservations.

The Secretary of State has presented a convincing argument that the proposed reservations will be effective to prevent "any legal relation on the part of the United States to the League of Nations," and that adhesion to the separate protocol will not involve "the assumption of any obligations by the United States under the covenant of the League of Nations."

If the proposed reservations are not effective for the purpose, they can easily be made so. It is inconceivable that a person or a nation be held to have consented to a relation or an obligation by the use of words which expressly deny such consent.

If these reservations are effective for the purpose, the whole controversy as to whether or not the United States ought to have joined the League of Nations becomes immaterial, and should not be permitted to obscure the calm discussion of the main question.

The Permanent Court of International Justice says Secretary Hughes, in his letter to the President, is an establishment "separate from the League, having a distinct legal status, resting upon the protocol and the statute. It is organized and acts in accordance with judicial standards and the decisions are not controlled or subject to review by the League of Nations." These assurances, from one whom the lawyers of the United States appraise as of the front rank of their profession, are entitled to be received with respect and confidence.

It has been objected that this court lacks power to compel the submission of all controversies to its adjudication. Is it not a sufficient answer to say that it has power to adjudicate on all controversies submitted by both parties, and that in certain enumerated controversies it has the right to adjudicate at the instance of a suitor nation? If it has the power to decide a part of those controversies which may be the potential causes of war, is it a valid objection that it lacks power to decide others of such controversies?

If so, we must condemn the very judicial institution, for there is no tribunal yet established by men without strictly limited powers and consequent lack of power to adjudicate on many forms of controversies.

Would it not be more logical and consistent for those who argue for an international tribunal with greater powers and wider jurisdiction to welcome this as a first step towards the substitution of justice for force in international controversies, and to go forward with hope that success in the limited field will bring the world to a larger acceptance of the judicial process in the future?

THE "NEW FEDERALIST" SERIES

The Journal prints in this number the first two of its series of articles on the fundamentals of the form and spirit of Americanism.

This is our contribution to the work of the American Bar Association through its committee on American Citizenship.

No political implication is to be drawn

from the title of this series, and no partisan purpose is involved.

There is an astonishing amount of ignorance as to the principles and ideals which underlie our national institutions. There is therefore a dangerous apathy when these principles and ideals are placed in jeopardy by ill-considered proposals for governmental changes or by neglect and forgetfulness.

Every twenty years there is a new generation, which knows nothing of the real significance of Americanism and, in addition to these native-born citizens, there is each year a growing stream of those who come to us without even the mental inheritances conducive to a sympathetic study of our laws.

The remedy for these evils is "a frequent recurrence to the fundamental principles of civil government."

Such is the simple purpose of this series.

THE AMERICAN LAW INSTITUTE

February 23 is an honorable date already in the history of the efforts of the American bench and bar to improve the administration of justice; and as the years go by it should become more and more profoundly significant. On that day a distinguished gathering, select and representative of all that is best in the bench and bar and the law schools of the country, met at Washington and organized the American Institute of Law, "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."

To the Association of American Law Schools and to the Committee formed at a meeting held in response to its invitation, as stated in the last issue of the Journal, is to be ascribed the credit for starting this movement of national importance. But to the necessity growing out of the present state of the law, to the vitality of the idea itself, to the appeal of the undertaking to the imagination of thoughtful men, to the unique conjunction of practical common sense and a magnificent dream embodied in the plan, will be due the larger success which all must hope awaits the undertaking.

In these days when impatience to see things realized at once works so strongly against undertaking enterprises whose success demands patience, devotion, and long periods of time, it is more than inspiring to see the beginning of one whose promoters contemplate a work of permanent value, accomplished thoroughly and without haste. In conception, at least, it associates itself with the greatness of by-gone enterprises that still flush the brow of the scholar and even the casual reader of history. It has a glow from the past upon it, as well as gleams of a hopeful future.

Perhaps we might say that it is a sort of Gothic cathedral of the world of legal intellect and achievement which is planned, to be built through the long years with infinite patience and skill, the workmen adding part by part, and changing part by part when there is need, until the structure is complete and the law at last is reasonably free from the complexity which now entangles it. It will be a privilege to watch the progress of this great work and an honor to have a part, however small, in the building of so noble and beneficent a monument.

LETTING THE PUBLIC KNOW

If this is not a nation of lawyers, as someone once said, it is at least a nation which is at present receiving some very useful information about movements to maintain high professional standards, both ethical and educational, to simplify the law and to improve the administration of justice.

The proposed canons of Judicial Ethics, which were printed in the February issue of the AMERICAN BAR ASSOCIATION JOURNAL and distributed to thirteen or fourteen hundred newspapers and magazines throughout the country, have received a gratifying consideration by the press, as indicated by the vast number of clippings upon the subject which have been furnished by a concern that specializes in that service. The matter seemed to appeal particularly to the editorial department, and the comments made were generally very commendatory in character.

The article by Mr. Thomas W. Shelton, printed in the January issue, in which he appealed to the press to get behind the movement for the passage of necessary legislation giving the courts power to establish their own rules of procedure also met with favorable response in many quarters. And the recent establishment of the American Law Institute at Washington appealed to many newspapers as an undertaking of the first magnitude and of general significance, and was given much attention in consequence.

SOME SOUTHWEST GEORGIA COURT SCENES

Incidents of Practice Told in Humorous Informal Address of Judge Roscoe Luke, of the Georgia Court of Appeals, at Annual Meeting of State Association—Assault with Half-Grown Hound Pup—A Deacon's Credibility—The Witness That Was Coached Too Well—Guilty of Trigonometry

I AM invited by our president to relate to you some of the incidents of my practice in southwest Georgia. I have been advised that the incidents which taste of good humor are the ones that will most likely please. I, therefore, find myself occupyiug a rather awkward place on the program. A man undertakes a serious burden when a part of his service is to be, even though for a few moments, humorous. I am further embarrassed by reason of the fact that the hour of final adjournment is present, and the "dinner-horn" is sounding at the tavern. With this confession, I shall trespass for only a few moments on your time.

As suggested by Mr. Franklin, who has just addressed you, giving to you some of his experiences as a practitioner in the northern part of the state, many things happen, that we forget; many things happen, that we cannot tell. In every court room there are at some time ludicrous situations presented by the conduct of the court, the parties, the witnesses, excuses by jurors, officers, etc. I have tried to catch, and I have enjoyed, every humorous situation presented. I don't want to get on the shady side of the street and live there all the time. I want to be most often on the sunny side. It is that side, when we leave the court room, that relieves us of the fatigue of our work. It is those situations that relieve a judge of his tiresome duties. Even my colleagues on the appellate court are refreshed by good humor.

It is hard to begin to note just the first humorous thing that suggests itself to me. There are so many incidents of my quarter of a century practice that are amusing that I hardly know the first to relate. Let's start, however, by relating an occurrence when I was first appointed prosecuting attorney in my county. I felt my importance and appreciated the responsibility. It was a "big" court, and I was present there with all the dignity that a prosecuting officer could possess. We were there for business, and serious business. The first case sounded on the docket was an indictment charging a negro man with the offense of assault and battery. As the trial began, I considered myself fortunate, for I was able to present in behalf of the State a white witness who had seen the alleged aggravated battery. We will say that his name is John. He was one of those fellows who, when you asked him a question, has to yawn. Now, these ladies may have never seen a witness on the stand who, when you asked him a question, will yawn before he answers, but these lawyers, nearly all of them, have. I put John on the stand, and, to make it brief, I interrogated him as follows:

Q. John, did you see this little disturbance between these two darkies?

A. (Yawning) I shore did.

Q. Where did it happen?

A. (Yawning) Down yonder back of the jail.

Q. Did you see this negro hit the other one over here?

A. (Yawning) Yes, sir; I was looking right at it.

Q. What did he hit him with?

A. (Yawning) Well, he picked up a half grown hound puppy and hit him the hardest lick I ever saw.

It was the first and last time I have ever heard of a battery being committed with a half grown hound puppy, but that happened.

At one time I was prosecuting several persons for gaming. My main witness was a Russian Jew. His name was Isaac Levine. He was questioned about as follows:

Q. Where were you born?

A. I vos born up stairs in mama's room.

Q. On the 15th day of June, were you on the second story of building No. 246 on Washington Street?

A. Surely.

Q. Who was there with you?

A. Joseph Einstein, Harry Levy, Abram Blumfeld, Jake Goldstein and all dem fellers what plays poker.

Q. Were they playing poker for money?

A. They vos playing poker for chips vot dey got out of de box.

Q. Did they put any money in the box for the chips?

A. Joost a leetle.

Q. Did you win any money?

A. Not one cent.

Q. Was there a kitty or a take out for the house when a full house was made or fours were held?

A. Ah-ha, I sees you played joost a leetle poker yourself.

My witness instinctively turned the card on me.

At one time in the trial of a case in Grady County, when Judge Bell was solicitor of that court, now judge, my opposing counsel put a witness on the stand to impeach my client. This witness testified that my client's character was so bad that he would not believe him on oath. On cross-examination I interrogated him as follows:

Q. Are you a member of Mt. Zion Baptist Church?

A. I shore am.

Q. Is not Mr. Jones, my client, a deacon in that church?

A. He shore is.

Q. Did you vote for him for this important office?

A. Yes, sir.

Q. Do you tell this jury that you voted for him as a deacon of your church when his character is just such that you would not believe him on oath?

A. Well, colonel, that was the best we could do at the time.

So you see it is possible to hold important office in the church by the vote of those who do not have the highest regard for the integrity of the officers.

A young lawyer was representing a negro charged with crime, and I was prosecuting him. To a question

asked by the defendant's counsel I lodged an objection. The judge turned to the young gentleman and said, "What do you say to that?" "Judge, I have this to say. I know the answer of the witness, and, if you rule that out, I will have nothing on which to base my argument in this case." I withdrew the objection.

While in an adjoining county to my own, attending court, I witnessed the trial of a negro charged with hog stealing. We all know that when you associate a negro's name with a hog he is usually a "goner." The lawyer representing the negro was quite a character. He had the reputation of having the strongest voice of any lawyer in that whole section, and it was his pride that he could fairly deafen his hearers. A hundred or so yards was close enough to understand his every word. The witness for the state was testifying about where the hogs ranged, and while the witness was undertaking to tell how the defendant got the hog out of the range over to his place, and was telling about the strewing of corn along for the hog to follow, he stated in referring to the defendant, "He tolled the hog from underneath a chinaberry tree."

The defendant's lawyer jumped to his feet and yelled, "Your Honor, I object!" You could have heard him three-quarters of a mile. Judge Roberts who was presiding, asked, "What is it you object to?" "I object to what he told (tolled) the hog; that's hearsay."

By the way, I was told afterwards that the ruling of the judge upon the lawyer's objection was made a special ground of motion for new trial, and no doubt the appellate courts subsequently had to pass on the question. You may see from this that all questions raised in the appellate courts are not of sufficient merit to reverse the rulings of the trial courts.

I was employed in the defense of a man. Let's call him "Buck" for he is still living, charged with the killing of his mother-in-law. The substantial part of my fee turned out to be the rifle with which he shot, and by the way, I still have this rifle. Our defense was that my client was crazy; no other defense would likely avail a son-in-law in the destruction of a mother-in-law who lived in the same house with her daughter and the son-in-law. After the conclusion of the evidence and the charge of the court, the jury considered the case for two full days, and finally returned a verdict of not guilty. I was interested to know what had kept these good and true men out so long, while my client was anxiously awaiting the result. I inquired of one of the jurors, and he told me that upon the first ballot, the jury stood eleven to one for acquittal. That one fellow sat in the corner and they couldn't get anything out of him. Finally one member of the jury approached him and asked, "What is the matter with you, why can't you get together with the balance of us?" "Well," he replied, "I don't think that the prosecutor in this case, the husband of this dead lady, should lose his wife, lose the case, and at the same time, have to pay the cost of the case." The question of "cost" kept my client on the anxious bench for forty-eight hours. You may see from this that the cost of litigation must be reckoned with.

I tried a case at one time where a step-mother had the grand jury to indict her step-son for using profane language without provocation in her presence. She testified to the language set out in the indictment, and in response to my question, said that it was used in her presence without provocation. The defendant's attorney examined her as follows:

Q. Aunt Mary, you didn't give John any provocation to use all of this vile language in your presence?

A. Not na'ry bit of provokement did I give him.

Q. What did you say to him just before he used this language?

A. I never said anything except that he was a sheep-thieving scoundrel and I can prove it.

Upon the defendant's acquittal, I had to say something to quiet Aunt Mary's temper, for Aunt Mary would have licked me right there if I had told her she had failed to make out her case. After explaining to her that by a peculiar wording of the statute framed by the legislature, we had lost her case, and not by her having failed to swear with sufficient force, she said, "God knows, if ever us good women can have something to do with the making of the laws, we kin git some sort of protection agin this kind of business."

I know that today Aunt Mary is happy in the realization of the right of woman to hold office and frame laws by their votes. We all agree that woman's right of suffrage will promote the best interest of society.

I attended a session of the justice's court presided over by a justice of the peace who had held the office for approximately forty years. There was a case pending in which both the plaintiff and the defendant were men of the highest integrity and whose word would be believed anywhere. Neither had a witness. The plaintiff testified to a state of facts which made a case for demanding a judgment in his favor. The defendant testified directly opposite and to a state of facts which disputed entirely the testimony of the plaintiff. The justice of the peace knew that neither of these men would testify falsely; that neither would be swayed in the least by interest. At the conclusion of the evidence, the justice who was presiding without the aid of a jury ascertained if there was anything further from either side before he should render his judgment. Counsel for both parties stated there was nothing further. The judge shouldered the responsibility and announced as follows: "Gentlemen, I set here in a two-fold capacity, as a judge and as a jury. As a jury, I declare a mistrial, and as a judge, I continue this case until the next term of the court at which time there must be some more evidence." What better judgment could the justice have rendered? What other conclusion could he have reached? When the testimony of the respective parties was placed in the scales, didn't they evenly balance? What would have been your conclusion?

While representing a railroad company, I seldom litigated cow claim cases, but there was one particular plaintiff that had so many cows killed that we determined it was best to litigate about every other month with him the question of our liability. I had talked with the negro fireman on the train that killed the cow in question at this particular time. He told me when the engineer observed the cows feeding near the track, he began blowing the whistle, and he, the fireman, began ringing the bell. He said the distance was three hundred yards away. I went over it with him several times and each time the cows were three hun-

dred yards away. When I put him on the stand, I questioned as follows:

Q. What is your name?

A. Three hundred yards away, sir, de engineer blowed de whistle and I begun to ring the bell.

The plaintiff got a verdict for the violent and sudden death of his Jersey cow. This convinced me that it is not always safe to go over your case too often with your witnesses.

A negro defendant charged with bigamy was discussing his case with one of our negro lawyers. The defendant discovered for his counsel that instead of only having two wives in violation of law, he had three. His attorney moved the acquittal of his client for the reason that "Your Honor, this nigger aint guilty of bigamy, he is guilty of trigonometry."

A most accommodating sheriff of my county was asked by me, during the progress of a trial, to please bring me the 104 Ga. Report. With the assurance that he would soon return with it, the sheriff left in search of it. Some little time afterwards, he returned and proffered me a book, saying, "Judge, I couldn't find the 104 Ga., but here is the 105 Ga., and it is the nearest to the number you wanted, I hope it will do just as well." The adverse judgment rendered against my client convinced me that the 105 Ga., was as of much service as the 104 Ga. would have been.

Judge Sibley's statement this morning to the effect that no one commended a spy or stool-pigeon, but had to endure them, reminds me of an incident in the trial of a negro charged with disturbing religious worship. The negro preacher, in giving details of the disturbance during his service, related the conduct of the defendant as follows: "Gentlemen, dis here nigger come in to my church while I was preaching a lucidating sermon to a great congregation, drunk and staggering from one side of de aisle to de other, and I stopped and looked straight at him, and with all de strength of my voice, I said to him, 'Nigger, I's gwine to appear before de bar of judgment and swear agin you for your conduct on dis Sabbath morning.' He says to me like dis, 'Gawd knows you will do it, it's de damdest rascal what turns state's evidence first.'"

Several years ago, one of the officers in my county was questioning a vagrancy suspect. He ventured to ask the gentleman(?) what he did for a living. His answer was, "My wife makes coats for Mr. John Andrishok, the tailor on Broad St. That is what I do for a living." Suffice it to say that on the next day, this hard working man was seeking other ways of making a living. . . .

Just here I have in mind an address delivered a few years ago by Judge Maynard before the Michigan Bar Association. He was discussing the 5 to 4 decisions of the Supreme Court of the United States. As a preface to that discussion, he recited many instances where by one vote the whole current of affairs was changed, or by one incident history was made.

I remember he told the story of how a pig caused the war of 1812: "An election was being held for members of the legislature in Rhode Island. One thrifty Federalist farmer put off going to the polls until late in the afternoon, leaving himself just time to get there before they were closed. Just as he started, he heard a pig squeal. He looked around and saw that the pig had its head caught in an old worm fence. The farmer stopped to get the pig out and as a result when he did get to the polls, they were closed, and he lost his vote. A man running on the Democratic ticket was elected by one majority. At the following session of the legislature, a Democrat was elected to the United States Senate by one vote. In the United States Senate the vote deciding that we should war with England was carried by one vote. The Rhode Island Senator so elected voted yes. It follows that the pig caught in the fence caused it all."

He further tells of the election of General Andrew Jackson over General John Sevier for the Major Generalship of the Tennessee Militia by one vote, and that under Jackson's leadership, we won at Horseshoe Bend and New Orleans. He gives the further example of where one vote gave to the United States Senate the great Thomas H. Benton, who for so many years was a commanding figure in the United States. He relates this incident as follows:

"On the evening of the Missouri first legislature, Mr. Barton was unanimously elected one of the new State's senators. Then followed a deadlock for three weeks on the other senator. To break it, the legislature allowed Barton to select his senatorial partner. He selected Benton, but he was so unpopular that it took three weeks to elect him, and then by just one majority. That one vote was cast by a sick member who was carried in on a stretcher and who died half an hour later. That one vote launched Mr. Benton on his great career."

It is not seldom that just one little incident influences the finding of a jury and sometimes influences sentiment everywhere. The little incidents and the little friction that take place in this bar association promote the best that there is in us, and this is true of the humorous as well as the serious incidents. Because of the seeming friction at this meeting, let not some of the people of the State gain the notion that the lawyers of this State, that the judiciary of this State, that the people of this State are not all right, for when it comes to the enforcement of the law, the preservation of society, the guaranty of the right to enjoy life, liberty and property, the worship of God according to the dictates of his own conscience, the best on God's earth live with us. My friends, I am not a pessimist, I am a natural born optimist. I am almost like the fellow that fell out of the eighteen-story building, when he passed the tenth floor in his descent, he said, "Thank God, I am all right up to now." Let not unjust criticism disturb you, keep your faces eastward towards the rising sun.

American Citizenship Campaign in Delaware

Members of the bar throughout the state of Delaware have formed a bar committee on American Citizenship, with the object of launching a movement to "protect and preserve the Constitution" and to promote the best interests of American citizenship. It is planned to inaugurate a campaign which will arouse the public to a realization of the dangers to which the Constitution is exposed and so rally sentiment to its defense against both covert and open attacks. Arrangements will be made for addresses by leading men, not only of the profession, but of all walks of life, and the subject will likewise be presented in the schools. The Citizenship Committee is composed of Judge Hugh M. Morris, Chairman, Judge Hubbard L. Rice, Josiah Marvel, John P. Nields and George M. Davis.

DECISIVE BATTLES OF CONSTITUTIONAL LAW

II. COHENS vs. VIRGINIA
(6 Wheat. 264)

By F. DUMONT SMITH
Of the Hutchinson, Kan., Bar

THE case of Cohens vs. Virginia, decided in 1821, is not next in point of time to Marbury vs. Madison in Marshall's great constitutional decisions, but it is next in point of interest. The former proclaimed the interpretive power of the Supreme Court over Congress. The latter established the appellate power of the Supreme Court over the courts of the various states in every case involving the Constitution, laws or treaties of the United States.

Congress in the act providing for the government of the District of Columbia had authorized that government to establish a lottery for the purpose of making internal improvements in the city of Washington. The lottery was established. The Cohens were convicted under a Virginia statute of selling in the city of Norfolk two half tickets and four quarter tickets in this lottery. They appealed to the Supreme Court of the United States. So slight was the cause. The case was tried upon an agreed statement of facts, which set forth in full the act of Congress, the Virginia statute and the fact of the sale, and this record was before the court.

Barbour for the State of Virginia filed a motion to dismiss on three grounds: First, because of the subject matter of the controversy (that the act establishing a lottery was purely local in its application and gave no right to sell tickets outside of the District of Columbia); second, that the state was a party; and third, that the Supreme Court had neither original nor appellate jurisdiction in such a case; and the cause came on to be heard first upon the motion to dismiss.

In 1813, in the case of Martin vs. Hunter, 1 Wheat 304, the Supreme Court of the United States had upheld its appellate jurisdiction in a case between private parties. The case involved the title to a portion of the Lord Fairfax land. Virginia attempted to forfeit these lands during the Revolutionary War, and Hunter claimed under a grant from the state. Martin, who was a nephew of and devisee under the will of Lord Fairfax, claimed that the Treaty of Peace of 1783 and the Jay Treaty with England of 1794 protected his rights. The Supreme Court held that this raised a question under a treaty of the United States and reversed the judgment of the Court of Appeals of Virginia in Hunter's favor and held that Martin was the owner. Spencer Roane was then president of the Virginia Court of Appeals, an able lawyer, and one of the most bitter anti-nationalists in the country. He was one of the Republican triumvirate that for years controlled Virginia with a political machine more perfect than the Albany Regency or Tammany Hall.

The Virginia Court of Appeals unanimously refused to obey the judgment of the Supreme Court and spread their reasons at large on the record. They denied the right of appeal from their final judgment in any case to the Supreme Court of the United States, declaring they were separate sovereignties, in matters of judicature, unrelated.

A second writ of error was taken to the Supreme Court in the case just above cited. Marshall did not sit as he and his brother had bought large tracts of the Fairfax lands. Story wrote the opinion, a very able one, reiterating the former judgment. So the matter rested until the case of Cohens vs. Virginia.

The motion was very ably argued on behalf of the state by Barbour and Snaith. Pinckney and Ogden of New York appeared for the Cohens. Eighteen years had elapsed since the decision in the Marbury case. Marshall had been twenty years on the bench. His great constitutional decisions had established his reputation. The court under his guidance had established its power. It was universally respected by the bar and profoundly feared by the Republican party. In any other court and probably at any other time the motion to dismiss would have been sustained on the grounds advanced in the opening of their arguments by both of the counsel for the state, that the act of Congress in question was a mere municipal ordinance for the city of Washington, having no extra-territorial force; as Barbour expressed it, no more force beyond the limits of the District of Columbia than an act providing for the paving of a street in the city of Washington. This was the first ground presented in the motion and the first ground argued. Snaith suggested further that even though the act were general, the state of Virginia might under its reserve police power prohibit the sale of lottery tickets within its territory for the protection of the morals of its citizens. This ground today would be sustained almost without examination.

The second ground was that the state being a party, under the Eleventh Amendment, the Court had neither appellate nor original jurisdiction; that it was a suit against the state; and third, that no appeal lay to the Supreme Court in any case. Marshall seized upon this ground, ignoring the others, as a hook upon which to hang his decision affirming the appellate jurisdiction of his court. If Barbour had paused in his motion to dismiss with the first ground and confined his argument to that, it is difficult to see how the court could have refrained from sustaining the motion to dismiss without considering the other grounds. By accident or design (and it was alleged by the Republicans that Barbour framed the issue to give Marshall his opportunity) it included the whole question of the appellate jurisdiction of the Supreme Court. The Chief Justice, somewhat disingenuously reversed the order of the objections set forth in the motion and plunged immediately into the consideration of the appellate power of his court, and overruled the motion to dismiss.

The case then came up on its merits, Webster appearing for the state, and in a very brief opinion the Court held that the act was local and affirmed the decision of the lower court. This was done upon the face of the record, which was fully before the

Court upon the motion to dismiss and that ground strongly urged. But Marshall was determined to go to the root of the whole controversy and settle it on the motion. Because the state was a party, because Marshall wrote the opinion, Cohens vs. Virginia is generally considered as the decisive case on the appellate power of the Supreme Court of the United States. Whatever may be said of Marshall's opinions in ordinary cases like equity or maritime law, when he proceeds to examine a constitutional question where there are no precedents to guide, no judge, living or dead, has ever equalled him. There is an Olympian power, a Jovian force, about his utterances that are irresistible. It is as though a god stooped to instruct a mortal. It is as Whistler said once, "I am not arguing with you; I am telling you." He will announce that a certain contention "is absurd and extravagant, but we will give it careful attention"; an attention that devastates the argument and withers its proponent. Nowhere, except perhaps in McCulloch vs. Maryland, has he appeared to better advantage than in this great case.

At the very opening of his opinion Marshall settled the case and destroyed every argument of the defendants in error by this simple statement of their claim:

> They maintain that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the courts of every state of the Union. That the constitution, laws, and treaties, may receive as many constructions as there are states; and that this is not a mischief, or, if a mischief, is irremediable. These abstract propositions are to be determined; for he who demands decision without permitting inquiry, affirms that the decision he asks does not depend on inquiry.

He shows that this is not a case against a state, although the state is a party. He defines a suit against a state as a suit in law or equity in which the plaintiff demands something from the state, seeks to recover something of value. In the case at bar the Cohens demanded nothing from Virginia, could secure nothing except the right to sell these tickets, a right denied by the state. He gives an interesting historical survey of the reasons for the adoption of the Eleventh Amendment and dismisses that contention which had already been settled by McCulloch vs. Maryland. He comes then to the general appellate power of the Supreme Court over decisions of state courts where the Constitution, laws or treaties of the United States are drawn in question:

> The American States, as well as the American people, have believed a close and firm Union to be essential to their liberty and their happiness. They have been taught by experience, that this Union cannot exist without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent states. Under the influence of this opinion, and thus instructed by experience, the American people, in the conventions of their respective states,, adopted the present constitution.
>
> If it could be doubted, whether from its nature, it were not supreme in all cases where it is empowered to act, that doubt would be removed by the declaration, that "this constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding.
>
> This is the authoritative language of the American people; and, if gentlemen please, of the American States. It marks, with lines too strong to be mistaken, the characteristic distinction between the government of the Union and those of the states. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution; and if there be any who deny its necessity, none can deny its authority.
>
> To this supreme government ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared, that they are given "in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity."

He then plunges into his favorite theme, nationalism:

> That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes, her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a state, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These states are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate.
>
> In a government so constituted, is it unreasonable that the judicial power should be competent to give efficacy to the constitutional laws of the legislature? That department can decide on the validity of the constitution or law of a state, if it be repugnant to the constitution or to a law of the United States. Is it unreasonable that it should also be empowered to decide on the judgment of a state tribunal enforcing such unconstitutional law? Is it so very unreasonable as to furnish a justification for controlling the words of the constitution?
>
> We think it is not. We think that in a government acknowledgedly supreme, with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The exercise of the appellate power over those judgments of the state tribunals which may contravene the constitution or laws of the United States, is, we believe, essential to the attainment of those objects.

He quotes from "a very celebrated statesman" (unnamed):

> Thirteen independent courts (and we now have 48), of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.

In the argument on behalf of Virginia it was suggested that not every constitutional question could be appealable, and hence none were. For instance, suppose a state should grant a title of nobility. Could the Supreme Court act on this? Marshall answered:

> If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is

given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the constitution, to which the judicial power of the United States would extend.

It was suggested again that the various states could destroy the Constitution by simply failing to elect senators. He says:

> It is very true that, whenever hostility to the existing system shall become universal, it will be also irresistible. The people made the constitution, and the people can unmake it. It is the creature of their own will, and lives only by their will. But this supreme and irresistible power to make or to unmake, resides only in the whole body of the people; not in any sub-division of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it.
>
> The acknowledged inability of the government, then, to sustain itself against the public will, and, by force or otherwise, to control the whole nation, is no sound argument in support of its constitutional inability to preserve itself against a section of the nation acting in opposition to the general will.

He points out as conclusive of the whole matter that the Constitution of the United States was not adopted by the states and is not the creature of the state governments. "We, the people of the United States," framed and adopted the Constitution. It was not ratified by the states as such, but by conventions called in each state springing directly from the people, speaking the voice of the people of the United States. True, the conventions were called in each separate state, but that was because the only machinery that existed for calling the convention was found in the separate states. So they, the people of each state, had formed the government of that state and helped to form a government of all the states supreme in all that concerns national affairs. There is no answer to that argument.

Of course, the decision was bitterly denounced. It was asserted that it prostrated every state government and made every decision of the state courts appealable to Washington. These apprehensions, if they really existed, were allayed and these statements answered in the case of Bank v. Dudley, Lessee, 2 Peters 492, in which the Supreme Court held that the interpretation of the Constitution, or a law of any state, by the highest court of that state is binding upon the Supreme Court of the United States. From that time on the two jurisdictions have proceeded side by side without friction, although many cases of conflicting jurisdiction, surrounded with much doubt, have since arisen. Marshall, the soldier of the Revolution, who had suffered at Valley Forge, who knew the utter incapacity of the old federative system, had devoted himself to the cause of nationalism. That was his religion. That was the altar at which he worshiped. Despite the strongest opposition, the fiercest criticism, despite the settled opinions and convictions of a great majority of his countrymen, step by step he was building up a national government.

The importance of this case cannot be exaggerated. If each state had the power to determine for itself its own interpretation of the Constitution, laws and treaties of the United States, chaos would result. This case has been the centripetal force that has held the Union together. Without it, this country would have long since dissolved into "dissevered, discordant and belligerent fragments."

A DEAD BRANCH OF THE CONSTITUTION

Proposed Amendment to Constitution Abolishing Electoral College Destroys Merely a Form from Which the Spirit Has Long Departed, Having Been Taken Over by Party Organization and Employed for Its Own Ends

By JAMES T. CLARK
Of the Oswego, New York, Bar

WITH the adoption of the proposed amendment to the Constitution, abolishing the electoral college for the President, would go the form of something from which the substance has long since vanished so far as the Constitution is concerned. The device itself, which the founders made a conspicuous feature of national elections, has been so long dead that its passing hardly arouses any interest. No heed is given to the principle of elections which it represented. And yet it is a fact that it was regarded at the time of the adoption of the Constitution as a vital and peculiarly successful device to secure the workings of popular government. Where has the spirit fled? It is a remarkable and picturesque example of the sort of sleight-of-hand to which democracy seems to be subject, between the forms which it from time to time adopts, based on old precedent and authority, and the will-of-the-wisp of the popular mind, which uses them as it pleases, transforming their entire nature.

This feature of the Constitution represented the adaptation of the representative principle to large electorates, and it was held to be a device which would preserve the substance of a popular government. In the 68th number of The Federalist, Alexander Hamilton, speaking of the college of presidential electors as proposed for the Constitution, said:

> It was desirable that the sense of the people should operate in the choice of a person to whom so important a trust was to be confided. . . . It was equally desirable that the immediate election should be made by men capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation and to a judicious combination of all the reasons and inducements that were proper to govern their choice. *A small number of persons selected by their fellow citizens from the general mass will be more liable to possess the information and discernment necessary to so complicated an investigation. It was peculiarly desirable to afford as little opportunity as possible to tumult and disorder.*

Hamilton here clearly indicates the natural advantages of the indirect plan. His notes on the reception of this feature of the Constitution are interesting:

> The mode of appointment of the Chief Magistrate of the United States is almost the only part of

the system which has escaped without censure or which has received the slightest mark of approbation from its opponents. The most plausible of these that has appeared in print has even deigned to admit that the selection of the President is well guarded.

The foregoing reasoning applies equally, of course, to the indirect election of United States Senators as provided in the Federal Constitution.

The reasoning which applied to the supreme office of the presidency in Hamilton's time, now applies to thousands of offices in this country. The constituencies are as large. As to the presidency it applies a *fortiori*.

It will be borne in mind, that at the time of the adoption of the Constitution, the whole nation represented a population less than that of New York City today, and distributed in scattered knots along the coast. Nevertheless, it was foreseen that in exercising their choice for the head of a nation, it was necessary that the mass of the voters be strained through a more select and smaller body. The reasoning of Hamilton for the value of this device need not be elaborated. It was not altogether an original thought. So inherent is it in the nature of any satisfactory selection by large numbers that it has appeared again and again historically in crises of government in various countries. It is a thing of nature, and the Bible's "captains of tens and captains of hundreds" is only older wisdom than the astonishing statement, by Shakespeare, wherever he derived it, of the same cohering organization of republics. Turgot crowned with it his efforts to save France from the maelstrom.

The answer to this puzzling vanishing trick, by which the spirit has gone and left only the empty form of the electoral college today, is that it has been taken over bodily by party organization. The transaction can be most aptly described as a shell game. It was in the Constitution and now it is in the party organization. The latter's system of primary and convention is the logical development of the principle which Hamilton held so valuable for the Government. It has become extra-constitutional, and has been put in the service of party organization as contrasted with Government. The difference is, so far as the public is concerned, that whatever value it has has been lost so far as its direct exercise by the people as a whole is concerned, and has been eaten up by parties for their own ends. Designed to be under the authority of government, it has been, like a queen bee, transferred to another hive and the busy politicians have tended it for their own ends.

The proposal to abolish the electoral college is naturally supplemented by the plan of direct voting for the President. It is curious to see how the abolition of this long untenanted form leads to the same step as if it had been something vital that was being destroyed. By doing away with this husk from which life has gone, the American people are not doing away with the principle of compound representation, and their adopting in form direct voting for the President is an empty gesture and delusion. They are not returning to a direct popular choice of the President. If that were possible, it would hardly be desired, for a little thought shows the idea of direct universal suffrage for the choice of a President to be impracticable. Twenty million people can make no choice by voting in a mass. The fact is that when we say that we will abolish the electoral college and will vote directly for the President, we simply recognize something which has long since come about, so far as it has any meaning. What we really do is to vote directly for the candidates of the parties who have done the *se*lecting for us. We *e*lect between their candidates.

It has a sweet sound, as Pecksniff used to say of mercy and charity, this talk of voting directly for the President, but it is really a naive exhibition of the simplicity of Democracy, that it can speak as if it were really abolishing something which has long since been abolished. So far as being a part of our national election system, everybody knows that the college of Presidential electors has played no part for three-quarters of a century. Only a foreigner, such as Mr. H. G. Wells, could still believe that it had any vitality. It is significant of the hypnotism which party has really worked on Democracy. No greater testimony to the power and vitality of the principle grafted on the Constitution in this device, so lauded by Hamilton, could be than the dominance of party. It has carried off the prince and rules by his power, leaving the palace of Democracy empty.

So deep is this sleep of Democracy, that it no longer perceives the value of that of which it has been robbed. It has no thought, in order to regain its vigor and free itself from the servitude of party, of recovering this great principle represented in the Constitution by the electoral college. On the contrary, it has long been tending in exactly the opposite direction, namely, to direct voting in name, as illustrated by the direct primary, prime popular favorite of the day. Party having stripped it of its strength in so deft a way that it did not realize its loss, and thinking still to be exercising its natural powers, it repudiates, because of its misfortunes due to party, the very device which party has taken from it and turned to its own advantage. Party and the nation are not one. Parties are rival camps who fight over the control of Government, and in order to triumph must use anti-popular means. This present drama of amending the Constitution in one of the most vital features, however it be a play of shadows, can hardly be allowed to pass without calling attention to the real drama in which Democracy has been the dupe and in which party has afforded the material for many a comedy. Yet this betrayal of Democracy has been so complete, and the transformation, or lightning change, or metempsychosis, has been so subtle, and the substitution and the illusion of party as government so real, that it seems almost hopeless to awaken it by repeating in the dull ears of the drowsed the words of Hamilton. And yet from the logic of the real acts of this drama, instead of the false which the harlequin party has veiled it with, the principle invoked by the founders of the Government in the electoral college has a thousand times and in a thousand instances the value today that it had then. The revolt from party is dissatisfaction with leaders that do not lead, with guides who have their own goals which are not the same as those of the public. It is a real dissatisfaction and the worst of it is that it is impotent so long as party is like a lion in its path. It cannot do anything because the road is held. If the public were free of its natural powers, there could seem no readier road to organize them for its own good than to take the back track toward the principle of the electoral college, as illuminated in the 68th Federalist, and seeking through compound representation of intermediate electoral colleges the true expression of Democracy, rather than through the too simple direct primary or the too artful party snares. Whatever its merits, it has had no fair trial by Government but only by party.

INJUNCTIONS RESTRAINING PROSECUTIONS UNDER UNCONSTITUTIONAL STATUTES

Illustrations of Exercise of Power Furnished by Recent Decisions of U. S. Supreme Court—Advantages of Equity Suit as Affording More Adequate Relief—Distinction Between Property and Personal Rights in Such Cases Should Be Abandoned*

By Simon Fleischmann
Of the Buffalo, New York, Bar

THE briefly worded memorandum in the case of Buffalo Gravel Corp'n v. Moore, District Attorney (234 N. Y., memo.) reads as follows:

> Order affirmed, with costs, upon the ground that upon facts stated in complaint equity will not enjoin prosecution of the indictment against plaintiffs. The constitutional questions which have been discussed are not considered.

The legal mind, and not unlikely some lay mind, instinctively asks: "Why were the constitutional questions which were discussed, not considered?" It is difficult to conceive of a situation in which such constitutional questions are not vital, and the record in the above case discloses that such is the situation here, whatever the correct solution of the constitutional problems ultimately may be.

The Appellate Division of the Supreme Court, Fourth Department, as appears from the carefully considered opinion, did consider both the constitutional and the procedural questions involved, and reached a conclusion adverse to plaintiffs on both propositions (Buffalo Gravel Corp'n v. Moore, 201 A. D., 242).

The Supreme Court, at Special Term, had likewise fully expressed its views on both the constitutional and practice questions, favorable to the plaintiff, but was reversed on both grounds by the Appellate Division (Buffalo Gravel Corp'n v. Moore, 118 Misc., 61). . . .

The five corporations and four individuals who are the plaintiffs in the Buffalo Gravel Corporation case were indicted in August, 1921, by a grand jury of the Supreme Court of New York, in Erie County, charged with a violation of sections 340 and 341 of the General Business Law of the State of New York, known originally as the Donnelly Anti-Trust Law, in having entered into an agreement and combination whereby a monopoly in the sand and gravel business was created and competition restrained, in violation of the inhibitions of the statute. The indicted parties brought a suit in equity in the Supreme Court of New York against the district attorney to enjoin him from proceeding or prosecuting further under the indictment upon the ground that an amendment to the above section passed in 1918, by which combinations of farmers were exempted from its operation, rendered the entire statute unconstitutional, and found support for their contention in a decision of the United States Supreme Court holding invalid a similar statute of Illinois, the case being that of Connolly v. Union Sewer Pipe Co. (184 U. S., 540).

In the Buffalo case the trial court considered both the constitutionality of the act and the applicability of the remedy by injunction to restrain its enforcement, and in an opinion reached the conclusion that the act was unconstitutional and that an injunction would lie to prevent further prosecution of plaintiffs (Buffalo Gravel Corp'n v. Moore, 118 Misc., 61).

The Appellate Division likewise considered the constitutional validity of the law, or at least so much thereof as it felt called upon to consider to determine the question of its validity, and concluded that the act was valid, which of course disposed of the question on the merits (Buffalo Gravel Corporation v. Moore 201 A. D., 242). The court, in its opinion, however, projected its consideration into the realm of the propriety of enjoining the prosecution under the act, in case it had been found unconstitutional, and concluded that the suit in equity would not have been warranted under the authorities of the courts of the State of New York, even if the act had been held unconstitutional, formulating its views in the following language:

> It is elementary that equity will not interfere to prevent the enforcement of the criminal law. That rule has never been departed from in a case in this state when a person has been indicted and seeks to avoid a trial on the indictment by bringing an action in a court of equity to restrain the enforcement of the statute under which he was indicted on the ground that it is void.

And the court then said:

> There are at least three ways in which the plaintiffs could raise the question that the statute for the violation of which they have been indicted is unconstitutional and void, either by motion to dismiss, by habeas corpus or by plea.

We presume that the motion to dismiss to which the court refers is the equivalent of a demurrer to the indictment, and I shall presently consider the infeasibility and, as I believe, inadequacy of these remedies.

The Appellate Division, however, had some doubts as to the soundness of the principle that "equity will not interfere to prevent the enforcement of the criminal law," as it proceeded to a careful consideration of the merits based upon the validity of the law, saying:

> Assuming, however, that the conclusion that we have reached is wrong, we think that the Special Term erred in holding (the statute) unconstitutional.

The portion of the opinion of the Appellate Division holding that a suit in equity will not lie may therefore be considered obiter, leaving the question open, at least so far as the lower courts are concerned.

The memorandum decision of the Court of Appeals above referred to, that the court did not consider the constitutional questions at all, but affirmed the order of the Appellate Division sustaining the demurrer to the complaint on the ground that upon the facts stated in the complaint equity will not enjoin prosecution of the indictment against plaintiffs, leaves us in the dark as to whether the court meant to hold broadly that in no case in which the constitutionality of a criminal act is involved will it permit a court of equity to restrain prosecutions thereunder, or whether the court found

*Paper read at annual meeting of New York State Bar Association, in New York City, on January 19, 1923.

some technical or vital defect, omission or surplusage of allegations of fact in the complaint upon which it based its decision in this particular case. It would have been desirable to have had a more definite announcement from the highest court on this very important subject, and the court will doubtless have to meet the question squarely and fully at some future time.

The statement of the Court of Appeals in this case, considered in connection with prior decisions bordering on this subject, leads to the surmise that when called upon to decide the question squarely it will discountenance the use of an injunction for such purpose.

The federal courts, from the Supreme Court of the United States down, have practically taken it for granted that equity has power, to be exercised in proper cases, to restrain criminal prosecutions under unconstitutional state or federal statutes, and to grant preliminary injunctions where the constitutionality of a given penal law is doubtful and fairly debatable, and permanent final injunctions where the laws are held invalid.

Some of the federal courts have gone even further and held that such a restraining suit will lie not only where the statute is unconstitutional, but where a prosecuting attorney is transcending his authority under a valid statute (Jacob Hoffman Co. v. McElligott, 259 Fed., 525).

On the other hand, the federal decisions seem to hold that the remedy by injunction to restrain the enforcement of unconstitutional statutes or abuse of authority under a valid statute is limited to cases where property rights, as distinguished from personal rights, are threatened with irreparable injury or damage (Jacob Hoffman Co. v. McElligott, supra; Truax v. Raich, 239 U. S., 33).

A reference to a very few recent decisions of the Supreme Court of the United States will be appropriate to illustrate their exercise of this power.

In Hammer v. Eagenhart (247 U. S., 251) a suit in equity was brought to enjoin the defendant, a United States attorney, from enforcing an act of Congress intended to prevent interstate commerce in the protection of child labor. The suit was recognized as a proper one, and the District Court held the act unconstitutional, which decree was reversed upon an appeal taken directly to the Supreme Court of the United States.

In Wilson v. New (243 U. S., 332) the complainant sued the defendant, the United States attorney, to restrain him from enforcing as unconstitutional the act of Congress known as the Adamson Law, establishing an eight-hour day for those engaged in interstate commerce, and the Supreme Court of the United States reversed the decree of the United States Circuit Court of Appeals upon the merits, holding that the act was constitutional, taking it for granted that if it had come to a contrary conclusion on the merits a suit in equity with injunctive relief would have been proper.

One of the most recent if not latest authority sustaining suits in equity restraining the enforcement of unconstitutional criminal law is that of C. A. Weed & Co. v. Lockwood (250 U. S., 104), in which section 4 of the Profiteering Law, known as the Lever Act, was held unconstitutional, and a permanent injunction after indictment against its enforcement was granted against the United States attorney.

In the Weed case the District Court properly considered the validity of the act, and came to the conclusion that it was constitutional, evidently entertaining no doubt as to the appropriateness of an injunction in case it had held to the contrary (C. A. Weed & Co. v. Lockwood, 266 Fed., 785).

This decision, on an appeal from the order refusing an interlocutory injunction, was affirmed on the merits as to the constitutionality of the act by three judges of the United States Circuit Court of Appeals, two of whom held that the remedy by injunction would have been available if they had held the act constitutional, and one of them holding to the contrary (C. A. Weed & Co. v. Lockwood, 266 Fed., 785).

Thereupon the District Court rendered a final decree dismissing the bill on the merits, from which an appeal was taken directly to the Supreme Court of the United States, resulting in a reversal and the granting of a final decree awarding a permanent injunction (C. A. Weed & Co. v. Lockwood, 255 U. S., 104, supra).

This decision of the Supreme Court thus necessarily and squarely determines that a federal court has power to enjoin the further prosecution of any indictment found under an unconstitutional federal penal statute, at least where property rights may be injuriously affected, and the same jurisdiction would probably be held to exist in the federal courts against the enforcement of a state criminal statute which is violative of the federal constitution. This decision and prior decisions, however, are still to be regarded as not passing upon the question as to whether a suit in equity would be sanctioned even by the federal courts to restrain the enforcement of a federal or state unconstitutional penal law affecting only the personal liberty of an accused person, nor do the decisions point out a line of demarcation between the infringement of property rights and personal rights, or where the one begins and the other ends, or whether there can indeed be such a thing as the deprivation of personal rights without impairing property rights, or whether any distinction should be made at all as to the availability of the remedy by injunction. It seems to me that the line of demarcation between personal and property rights is rather shadowy, constituting at most a sort of "no man's land" between watchful and aggressive adversaries upon the domain of either of whom it was equally dangerous to trespass.

We are, indeed, not without judicial recognition of the soundness of this suggestion in the following statement formulated by the Supreme Court of the United States in the recent case of International News Service v. Associated Press (248 U. S., 236), where that tribunal, in discussing the basis of equitable jurisdiction, pointed out that the term "property" is to be given broad meaning, saying:

> In order to sustain the jurisdiction of equity over the controversy we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right . . . and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired.

That case was recently cited with approval in the United States District Court for the Southern District of New York in Jacob Hoffman Co. v. McElligott (supra).

The reluctance of our courts to entertain suits in equity to restrain criminal proceedings may in part if not wholly be traced to the English law, where it was based on considerations less applicable or entirely in-

applicable to American institutions and contemporary judicial procedure, as was pointed out in Huntworth v. Tanner (152 Pac. 523), where the court said:

> The general rule in equity arose from the English law, where the line was strictly drawn between law and equity. That reason for the rule no longer exists, as our court administers the law without distinction. Furthermore, in English law there is no such principle in force as our law of the unconstitutionality of a statute.

It seems to me that an enlightened and progressive jurisprudence, federal and state alike, will have to advance to a point, either by judicial declaration, now doubtless within the power of the courts themselves, or statutory declaration sanctioning a suit in equity or some other equally satisfactory and adequate remedy or procedure, restraining the enforcement of or the prosecution under a statute claimed to be unconstitutional and whose constitutionality is doubtful or fairly debatable, and that such a remedy shall be equally available where the enforcement of the statute will prejudicially affect property or personal rights or both.

The importance of protecting the members of a lawfully organized community from punishment or injury under an unconstitutional law in a constitutional government is obviously vital and fundamental, reaching to the very deepest roots of our institutions. The maintenance of constitutional rights is especially to be guarded in these days of attempted encroachment thereon, and the legal profession in particular is called upon to "stand pat," to borrow a colloquial but expressive phrase, in maintaining these principles. It has become elementary in American jurisprudence, which stands alone in this regard, that an unconstitutional law is no law at all; so that punishment or injury inflicted thereunder is, strictly speaking, illegal and unlawful and, in a more comprehensive sense, lawless.

Now comes the question, how, when and at what stage of a threatened criminal prosecution shall an accused person have the right to test the constitutional validity of a given criminal statute, without which there can be no crime, common law crimes finding no recognition in our system, and *ex post facto laws* being likewise banned?

It seems to me that upon the soundest principles of our legal system an accused person should have the right at the threshold of the prosecution to have the validity of a given law determined before he is subjected to trial thereunder where there is reasonable doubt of its constitutionality.

We cannot afford seriously to adopt the judicial method of procedure suggested by the great satirist W. S. Gilbert in his libretto of "The Mikado," where, by reason of the scarcity of executions in the Japanese province of Titipu, the Lord High functionary of various departments, Pooh-Bah, suggests to Ko-Ko, the Lord High Executioner, that he himself should be executed so as to satisfy the central authority as to resumed activity in his unpopular department. Ko-Ko naturally finds objections to this suggestion, and the following bit of dialogue ensues:

> Ko-Ko: I can't execute myself.
> Pooh-Bah: Why not?
> Ko-Ko: Why not? Because in the first place self-decapitation is an extremely difficult, not to say dangerous, thing to attempt, and in the second, it is suicide, and suicide is a capital offense.
> Pooh-Bah: It is so, no doubt.
> Pish-Tush: We might reserve that point.
> Booh-Bah: True, it could be argued six months hence, before the full court.

Does this humorous and satirical illustration of having the validity of an execution—one might say body execution—argued six months after the decapitation of the victim, seem an exaggeration? Let us see.

In one case with which I am uncomfortably familiar a merchant to whom injunctive relief against trial under the Lever Act was denied (C. A. Weed & Co. v. Lockwood, 264 Fed., 453; 266 Fed., 785) was tried, with great newspaper publicity, and secured a disagreement of the jury. Months thereafter the Supreme Court of the United States declared the section of the act under which he was tried unconstitutional (C. A. Weed & Co. v. Lockwood, 255 U. S., 104). Meanwhile, as the result of the trial and the publicity attending it, he was ruined in business, and naturally his creditors also suffered a large loss in the collection of their just dues. The damage was comprehensive and irreparable.

In another case a party indicted pleaded guilty, was fined several thousand dollars, which was paid, and after the act was held invalid he sought to obtain a return of his money from the government, but has thus far been unable to do so.

In another case a man indicted for violating the same law committed suicide before the Supreme Court declared the act invalid, when it was obviously too late to repair the damage.

So there have been numerous other cases of financial ruin and probable shortening of life in the attempted rigid enforcement of an unconstitutional criminal law. It seems to me that we have here clearly a reflection, if not a travesty, on the administration of the law in a free country.

Numerous objections have been and are urged against testing the challenged constitutionality of a criminal law other than on or in connection with the trial to be had under the indictment, unless perchance the trial court will sustain a demurrer to the indictment on this ground, which is seldom to be expected.

The delay or supposed delay resulting from injunctive interference constitutes perhaps the most frequently formulated objection to such procedure, and we quote the opinion of the Appellate Division in the Buffalo Gravel Corporation case above cited as follows:

> It is a trite saying that the speedy enforcement of the criminal law is of more importance than the extent of the penalty imposed. To hold that equity has such jurisdiction would, as stated by Judge Andrews in Wallach v. Society (67 N. Y., 23), "in the general result encourage rather than restrain litigation." The delay which has already occurred in this case is a good illustration of what would often happen. The procedure which has always been followed in this state is adequate for the protection of persons arrested or indicted, and a court of equity should not assume jurisdiction in this case.

While it may be correct to state that the speedy enforcement of the criminal law is of more importance than the extent of the penalty imposed, it is equally true that the speedy enforcement of the criminal law is not of more importance than are the consequences of enforcing an invalid criminal law by even temporarily punishing a supposed offender thereunder. Again, it is a contradiction in terms to designate the speedy enforcement of an unconstitutional law, as the enforcement "of the criminal law," as an invalid penal statute does not constitute a criminal law at all, nor any other law.

The cases in which there is any occasion for the intervention of a court of equity to restrain the enforcement of an unconstitutional law are few and far between, but when such a case presents itself occa-

sionally, and the question of the invalidity of the penal law is fairly debatable or a matter of doubt, it is of the highest importance to the maintenance of constitutional safeguards that this preliminary question should first be authoritatively disposed of and determined, and at the earliest practicable moment. In case an act is held unconstitutional in such a preliminary action or proceeding, time, expense and injury will indeed be saved, and delay in the ultimate disposition of a case avoided, and where any delay is caused —which of course should be reduced to the minimum —the courts have it within their power to reduce this to a minimum by giving preference to the disposition of such a question before them.

It is also to be borne in mind that the cases in which there will be occasion for interference by injunction with the enforcement of statutes claimed to be unconstitutional will be rare and far between, but they will usually be cases in which it is of the utmost importance that the constitutionality of a given penal statute be preliminarily determined.

Such cases will almost, if not quite, invariably arise under recently enacted statutes, like anti-trust laws, profiteering acts during wars, where laws are enacted under the stress of public excitement and unreasonable pressure, and in which there is danger of overstepping constitutional limitations, as was illustrated in the Adamson Law, the Profiteering Act, the Soldiers' Bounty Law in the State of New York and other analogous measures.

It has been deemed the peculiar virtue of our constitutional system that it protects individuals and minorities against the onslaught of majorities, whether physical or statutory, lawless or made under the guise of law.

It is obvious that the great bulk of our criminal statute law and of new penal statutes constantly and properly passed by Congress and our Legislatures is not of even the remotest doubtful constitutionality. As the remedy by injunction, and particularly preliminary or temporary injunction, would and should be left discretionary with the court or judge to whom application therefor is made, there will always be ample protection to the public against the granting of injunctions to inhibit the enforcement of clearly constitutional statutes. There is not the slightest reason to suppose that any sane lawyer would ask, and if possible less that any sane judge would grant an injunction to restrain the prosecution of a person charged with what was formerly known as common-law larceny, but did not become a valid criminal law under our institutions until embalmed in a statute. And so we may go through the category of penal statutes, old, new and to be enacted in the future, and there is no reason to apprehend that more than an occasional enactment will present sufficient doubt as to its validity to warrant injunctive interference with its enforcement.

When a newly enacted statute comes along, however, or if there are any old ones left and revived, presenting a fairly debatable constitutional question which a court or judge must be presumed to be able to recognize, its application to the prejudice of any individual or corporation should be promptly stayed so that if it is found or held to be invalid by the highest judicial tribunal authorized to pass upon its validity it may inflict as little injury as possible upon those who are accused of coming under its penalties.

Of course, there should be no statute passed by Congress or the Legislature of any state giving an accused person an absolute right to an injunction in such situations, but the courts should declare, in the interest of public policy and constitutional vindication, that they will not look with disfavor upon an application for an injunction where there is reasonable doubt of the validity of a penal statute, or a declarative statute could properly be passed recognizing and confirming or conferring such discretionary power upon the courts, so that judges would feel that they had official sanction for considering such applications upon their merits.

We have to-day, by way of analogy, a statute sanctioning the granting of a certificate of reasonable doubt pending an appeal from a criminal conviction. So, in the case of the claim of unconstitutionality of a penal law presenting reasonable doubt further proceedings should be stayed until the constitutional question is determined.

It has also been said that accused persons have adequate means of testing the constitutionality of a penal statute under existing laws, and we again quote from the opinion of the Appellate Division in the Buffalo Gravel Corporation case above cited language formulating this view, and to which I yield profound respect, while unable to acquiesce in its purport:

> There are at least three ways in which the plaintiffs could raise the question that the statute for the violation of which they have been indicted is unconstitutional and void—either by motion to dismiss, by habeas corpus or by plea. Those are the methods which have always been followed in this state. They afford the plaintiffs and all others full protection and ample opportunity to raise the question which it is sought to raise in this action. To permit a person in an action in equity to test the constitutionality of a statute under which he has been indicted would result in a radical change in procedure and would often lead to great delay in the enforcement of the criminal law.

It seems to me that it can be demonstrated that in the case of an indictment or threatened prosecution under a statute of doubtful constitutionality the existing remedies for testing the question above referred to are not adequate and do not afford full protection nor ample opportunity for raising the question, and for various reasons, of which these readily occur:

In the first place, as is illustrated by the Buffalo Gravel Corporation case, both corporations and individuals are indicted. The corporations cannot avail themselves of a habeas corpus to test the validity of the statute involved, as the corporations cannot be produced in court. Yet the conviction of the corporations, as such, must work havoc with the stockholders, and perhaps bondholders and creditors, the vast majority, if not all, of whom may be entirely innocent of any wrongdoing.

Again, it will always be extremely difficult to have a court in the first instance—and this involves no criticism whatsoever upon the judiciary—hold a penal statute unconstitutional in a habeas corpus proceeding by reason of the drastic and serious consequences that may result to the state from such a holding, should the statute be ultimately held valid. It is a settled principle that courts of original jurisdiction will not, except in the clearest cases, hold statutes unconstitutional, which principle, while perhaps at times carried to extremes, may be regarded as on the whole conservative of the public welfare. The effect of sustaining a writ of habeas corpus upon the ground of the unconstitutionality of a statute would be to discharge a prisoner from custody as well as to make it improper to hold

him to bail, and he could therefore with impunity leave the jurisdiction of the court and make it difficult to regain jurisdiction over him should the law be finally held valid. The remedy by habeas corpus in such a situation, I therefore contend, is not adequate, ample or fairly protective to an accused person.

Like considerations apply to a motion to dismiss or to a demurrer to an indictment based upon the ground of the unconstitutionality of a penal law under which the indictment is found. The consequences of granting such motions in the first instance are similar to those which would result from sustaining a writ of habeas corpus, and criminal courts will therefore be reluctant, and usually properly so, to sustain that practice. Furthermore, under the practice in this state, and probably in other states, and in the federal courts, no appeal will lie from a decision overruling a demurrer to an indictment or a motion to dismiss it, and where it is denied, and it usually is, redress on the constitutional question can only be had by appeal from a final judgment of conviction, and after the injury to the accused person is thorough, complete and irreparable.

Perhaps our criminal procedure could be amended or modified so as to permit a motion preliminary to trial to dismiss an indictment on the ground of the unconstitutionality of the law upon which it is based, and to allow an appeal from an order overruling such contention, with power in the court of original jurisdiction, as well as in the appellate court, to stay proceedings under the indictment until the determination of the preliminary constitutional question. This procedure would centralize the proceedings in the criminal action itself, and avoid the necessity for a separate injunctive suit in equity, and would afford legislative recognition and sanction for the exercise of the power to stay proceedings.

On the whole, however, and all things considered, I am disposed to favor the separate suit in equity as affording a better atmosphere and judicial attitude for the consideration of the question of the constitutionality of a given penal law, with discretionary power to grant a preliminary injunction until the final determination of the injunctive suit. Such a temporary injunction could be granted on proper terms, protecting alike the public and the accused party, and in any event it would leave in the criminal court power to hold a prisoner under bail and in every way to leave his status in the criminal court undisturbed until the vital question of the validity of the law could be determined by the highest court having power finally to pass upon the question. In case the application for a preliminary injunction was frivolous and presented no reasonable doubt as to the constitutional validity of a statute, the court could in its discretion refuse the injunction, as it now can in jurisdictions where the power concededly exists to grant the same. It is important, as it seems to me, to have the attitude of courts now holding that no such power exists or that it should be grudgingly exercised, as appears to be the case in the Empire State, in which the members of this association are particularly interested, radically changed, and to have the courts face about, so to speak, on this question, by bringing it to their attention through this association, or having the association recommend and urge declaratory legislation on the subject, which the courts, of course, may be expected to heed and follow.

It is also important and vital, as it seems to me, for the reasons already in part adverted to in this paper, that the distinction between the granting of injunctive relief against the enforcement of invalid criminal statutes affecting only property rights and those affecting personal rights be eliminated. It would at first thought appear self-evident that protection against restraint of liberty of the person under an unconstitutional statute should be more jealously guarded than that against the invasion of mere property rights, and yet the courts which have granted injunctions against the invasion of property rights under unconstitutional statutes have thus far been disposed to limit such relief to cases involving the prospective injury to property rights. There are, of course, reasons for the distinction, but they seem to me unsatisfactory. Probably the large foundation for this discrimination is found in the consideration that the question of the constitutionality of a statute under which personal liberty is actually restrained can be tested by habeas corpus, which could not be done in the case of an encroachment upon mere property rights. But for reasons already pointed out, it seems to me that this remedy is inadequate and practically unsatisfactory for the protection of personal liberty, as are the other remedies now available for such purpose, and which have already been considered. Besides, deeper thought and consideration must show that penal statutes essentially involving the restraint of personal liberty almost always, if not in a broad sense always, involve encroachment upon property rights.

At the outset a man's good name and reputation must be recognized as a property right and asset of the highest value, and while it may inevitably be impaired by the mere finding of an indictment, the injury is then at its minimum, and should be kept there if the law under which the indictment is found is unconstitutional. A trial under an unconstitutional statute, eventually held to be such upon an appeal from a judgment of conviction, with the publicity and expense attending it, is likely, as it often has, to spell ruin to the accused person. And I submit that after all, it is quibbling with the substance of things to say that under such circumstances an accused person has had a fair, adequate or satisfactory remedy for his protection. He is practically in the situation illustrated in "The Mikado," of testing the validity of the law under which he is punished after he is ruined. Indeed, the ultimate, logical force of my contention can be brought into bold relief by assuming that a person accused of a capital crime under a statute claimed to be unconstitutional should be actually executed before the unconstitutionality of an act under which he was executed is judicially determined. While such an outcome is shocking alike to a sense of law or justice, and is practically avoided in capital cases by the stay incident to an appeal in such cases from a final judgment of conviction, the principle is the same as in offenses not punishable by death, and proper protection to an accused should be given in all criminal cases in which the prosecution is based upon a statute whose constitutionality is attacked in good faith and is fairly debatable or doubtful.

Again, most penal statutes contain provisions for fines or imprisonment or both, and with the power of imposing fines there is the obvious possibility and likelihood of an invasion of property rights under an unconstitutional statute. This has indeed been recently illustrated in cases in which accused persons and corporations, pleading guilty

to indictments under the Profiteering Act, paid heavy fines, obviously encroaching on their worldly possessions.

It seems to me the distinction between the invasion of property and personal rights, in connection with the desirability of having injunctive relief against the enforcement of criminal statutes of doubtful constitutionality, is shadowy and unsound, and should likewise be wiped out by the courts themselves, or preferably, and with greater certainty, by declaratory legislation.

The situation presented by prosecutions under statutes which may ultimately be held unconstitutional also usually presents as a ground for recognized equity relief not only the great and irreparable injury done to an accused person under these circumstances, but the avoidance of a multiplicity of suits, as such statutes frequently make each violation a separate offense, and often carry with such violations the imposing and collection of repeated penalties. . . .

To bring this matter to a practical head I would invite the co-operation of this association and recommend to it the passage of a resolution declaring that it is the sense of the association that where a person threatened with prosecution, either before or after indictment or arrest, claims that a statute under which such criminal proceedings are threatened or taken is unconstitutional, and it appears to the court that there is reasonable doubt as to the validity of such law, a remedy shall be provided by legislative enactment giving to the accused person a right of action in equity to restrain the prosecution of the criminal action until the final determination of the suit in equity, with power in the court, in its discretion, to grant a preliminary injunction on proper terms protecting the People as well as the accused person; or that there should be an amendment of the Code of Criminal Procedure allowing to an accused person the right of appeal from an order of the court overruling a demurrer to an indictment where the constitutionality of a penal law is involved, and its validity is fairly debatable, with power in the court to stay further proceedings until the determination by the appellate court or courts of the constitutionality of such law. Such legislation should also provide for a preference and for the utmost promptness in the hearing and disposition of the matter in the court of first instance as well as in the appellate tribunals.

Personally I favor the suit in equity as affording more comprehensive and adequate relief, as well as greater elasticity for the protection alike of the individual and public rights involved.

NEW TRUST PROBLEMS FOR OLD

Examination of Underlying Premises of Present Trust Theory, Leading to the Conclusion that the Views of Courts and Economists Have Not Fitted the Facts of Industrial Evolution

By HOMER HOYT

Associate Professor of Economics, University of North Carolina
Member of District of Columbia Bar

THE growth of industrial combinations in the United States since the Civil War has caused the development of two bodies of specialized doctrine —the one legal and the other economic—that are more closely related to each other than they are to the general substratum of theory in their respective fields of law and economics. Because both the law and economics of this so-called trust problem appear to be in a rather unsatisfactory and muddled state, it may be worth while to examine the underlying premises of present trust theory to ascertain whether it has not suffered by a process of in-breeding.

First, let us consider the economic literature on the trust problem. Without going into the details of a story that is familiar to every student of economics, let us briefly note the method and the implications of the economic writings in this field.

The method that seems to be a universal favorite with every one who aspires to become an authority on the combination movement has been to give the life history of every trust that has been thrust into the spotlight of the public eye either because of its magnitude or its alleged nefarious practices. The chief characters selected for these biographies are of course the Standard Oil Company, the United States Steel Corporation, the American Tobacco Company and the International Harvester Company, but there are a host of minor combinations of varying degrees of size and nefariousness that have been added as cumulative evidence. After the writer had put each of these witnesses on the stand and had succeeded in damning them out of their own mouths, he proceeds to the conclusion—either expressed or implied—that the main purpose of these great combinations was to abrogate the economic law of free competition, and since these attempts to violate a law as fundamental as that of gravitation were doomed to failure, the policy of legal prohibition of these combinations was justifiable and in entire accordance with economic principles. The only wonder is that it ever became necessary to invoke economic or legal injunctions against a movement that was bound to collapse of its own weight.

Thus after an inductive study of the facts relating to particular trusts, the economic writers have generally reached the conclusion that most of these trusts are economic outlaws and that the whole movement is economically unsound. In this conclusion they are in complete accord with the lawyers who hold that the trusts are illegal.

Before we can decide whether the trust movement is economically unsound, however, we must decide what is sound economics. This is a task vastly more difficult than deciding whether a given legal decision is sound law. For the common law in the course of nearly a thousand years has developed an organic as well as a logical unity and into this fine old

system, which has both stability and resiliency, new cases can be fitted by those who have acquired the legal instinct. The law has become sub-divided into logical compartments, which guide the trained lawyer through the maze of decisions. Thus in the legal profession, a man may work patiently in a field that has been staked out for him, knowing that he is contributing to the advancement not only of his particular subject but of the whole science of law.

But economic science is not so well organized. It is true that there is all the outward appearance of the same logical division. Specialized courses in banking, transportation, insurance, marketing, labor problems, etc., are fenced off for the exclusive use of certain technical experts who become steeped in all of the practical problems of their own field. But all too frequently the unity of method and purpose that characterizes those working in separate compartments of the legal profession is almost altogether lacking, because there is no agreement among economists as to what really is sound economic theory. Economic theory *per se* usually means a history of theories of value and distribution of wealth, which, like ancient codes, no longer fit the rapidly changed industrial conditions of today. Because the form of statement of the classical economists often seems to be of little value in solving present-day economic problems, the very words "economic theory" are taboo with many economists. To achieve a real unity of economic theory would require not merely an appeal from old text-book statements to the living record of railroads, factories and mills that are right before our eyes, but it would also require a fusing of these facts with similar investigations in the realm of psychology, sociology, anthropology, etc., for economic theory is but the economic way of looking at the whole social process. Since this enormously difficult task has not yet been done, there is in fact no set of sancrosanct economic principles, by comparison with which any economic phenomenon can be declared to be unsound in principle. If anything has a tangible existence, its presence must be reckoned with. It is possible that these apparently exotic elements will in time grow to become the rule, thereby completely overthrowing the theory that declared them illegitimate.

Therefore the presence of large industrial combinations in our midst must be explained by an appeal to a broader set of principles than has hitherty been invoked. Admitting that the students of the trust problem have performed a great service to the science of economics by introducing into the pale, abstract and dismal political economy of the late nineteenth century the colorful epic of the trusts, that service has now been performed. We have learned as much as is possible from a mechanical study of isolated trusts, considered entirely apart from their social setting. To further discussions along the same old line, the writer desires to file a general demurrer. Admitting the facts but not the conclusions as to the economic villainy of trusts, it is contended that the old point of view with reference to the trust question is not relevant to present vital problems.

The first objection against the familiar mode of treatment is that it is too mechanical and too superficial. Every type of business, every possible period of time with reference to the business cycle and with reference to the cycle of evolution of that partioular type of business, and every imaginable combination of local conditions are lumped together in one incongruous mass without any attempt to give any relative weight to each of these factors. It is pointed out with much blowing of trumpets that nearly every combination of existing plants has been less successful than the original components before their union. But is there any reason—except for such minor influences as savings in cross freights, etc.—why a number of plants built and designed to operate as single technical units should derive any gain in mechanical efficiency by being joined together under one management? It is any wonder that such arrangements disintegrate? As well expect a sky-scraper built by stacking one house on top of another to refrain from falling down. But the observations as to the collapse of many of these abortive combinations does not disprove the fact that industrial concentration is growing in this country. The concern that attains virtual monopoly by internal growth is ignored by both the law and economics of the trust movement, and yet a business like that of Henry Ford that has a capital of half a billion dollars, that has a million people directly dependent upon it for support, and that through the use of its product has affected the lives of twenty million people, has as much influence as any trust formed by combination. The old economic treatises on the trusts ignore the broader aspects of the concentration problem entirely; the effect on the conservation of natural resources, the effect on the concentration of wealth into the hands of a few until 2% of the people of the United States own 60% of the wealth, the effect of tacit refusals of the dissolved members of a trust to compete with each other, the financial control of chains of businesses by the banks, the concentration of financial power in the Federal Reserve System, the concentration of population in great urban centers, and the growing consolidation of our entire industrial fabric. All of these vital questions that go to the merits of our industrial system are politely evaded and the reader's attention is diverted to the technical factors of monopoly price. The emphasis upon the power of trusts to raise prices and the effect of this upon the consumer is entirely exaggerated. At the most, the trusts could not raise the price level more than 5% by their own efforts before declining demand cut into their profits, while the forces at work during the war produced a price advance of more than 150%. Even if it were possible to disentangle the price-raising influence of the trusts from a myriad other forces, and to prove conclusively that the trusts had raised prices—which would only be doing what every business man is trying to do—it does not follow that such higher prices are a social evil. A higher price for lumber, gasoline, and coal might well curtail their reckless and wasteful use and help to preserve vital raw materials for future generations. Huge monopoly profits are sometimes used to establish universities, to build libraries, to erect factories giving employment to millions of workers, while money distributed to laborers or consumers is frequently spent for luxuries or foolish gim cracks. Without asserting that high monopoly prices are necessarily a public good, it is at least desirable to point out that anything affecting price must be considered in its broadest aspects before it can be authoritatively laid down by any economist or by any court that its effect is evil.

Before closing the economic discussion in this article, the actual facts as to the combination movement should be briefly mentioned. The reader may have inferred that the writer in attacking the theory of the universality of competition was impliedly set-

ting up an opposite theory—the inevitableness of great combinations. It is not necessary, however, in refuting an absolute theory of competition to affirm an absolute theory of monopoly. The writer is asserting that the size of industrial units is contingent upon many factors; the concentration of the raw materials, the extent to which the product is standardized, the period in the life cycle of the industry, etc. To discuss the entire matter adequately would require an examination of the course of the industrial development since the middle ages and the complex ramifications that exist today between every industry and every country, and there is by no means time to do that in the course of one article. Such a study will require the pains-taking work of many men and it will be part and parcel of a fundamental inquiry into our industrial society as a whole. All that one can do here is to point out the inadequacy of the artificially simplified approaches to the problem and to make a plea for a new trail into a territory as yet little explored.

In brief, however, the fundamental course of trust evolution seems to be somewhat as follows: Following the Civil War, the United States was rapidly knit together by a railroad system into one industrial unit with relatively homogeneous wants. A great opportunity for the quantity production of standardized goods by machinery was thus presented. Such production could be carried on to greatest advantage by concerns having a virtual monopoly of a particular product. At the same time, the concentration of the best iron resources in a limited area, and the great advantage of a single system of pipe lines and of telephones over duplicated systems gave rise to great technical units in the industries affected. Thus in the United States at the hey-dey of our industrialism there was a tendency for huge industrial concerns to emerge out of the welter of small firms. But this tendency may not persist forever. In the beginning of our industrial development, the size of each unit was small. Tiny iron forges, small lumber mills, disconnected railway links, small shops were characteristic of ante bellum days. In the youth of our industries, the small individual firm was the rule. In the prime of our commercial development, the great trust producing the great staples, surrounded still by hundreds of thousands of firms producing hand-made or small machine articles, is the typical form of organization. In the senescence of manufacturing, perhaps the dead shells of the giants will remain, while a host of small concerns spring up to take over the scattered brands of goods and the waning volume of output demanded by a smaller population.

But each individual industry has its own life cycle that may differ somewhat from the industrial cycle of the nation as a whole. Thus in the lumber industry in the South, the mills were small when the development was in its infancy; they reached their maximum size when the dense stands were being cut, and then as the great saw mills moved to the Pacific Coast, the little band saws were again brought in to clear out the scattered stands and the second growth timber.

Each nation likewise has a different size of maximum efficiency for its industries. America, because of the high price of its labor and its large machinery which is adapted only to standardized goods, has had on the whole the largest units. In Europe, cheaper labor power has been devoted to fine hand-work, with the resulting smaller industrial plant. France, producing fine laces and artistic products, has perhaps carried this tendency to an extreme.

Thus the economic facts show that the size of industrial units is dependent upon many factors and that no universal law can be laid down from the examination of a few isolated trusts. Let us now cross over to the legal side of the fence and see what attitude the American courts have taken on this same problem.

Here again, it will be impossible in the course of this article, even to refer again to the main landmarks of Anti-trust law. But to generalize from a brief study of the cases, it may be said that the courts have carried over into present decisions the theory of the small firm and of the beneficial effects of competition which characterized an earlier industrial age. In so acting, the courts were not dominated to any marked extent by the economists; rather both economists and courts were profoundly influenced by that exuberant American individualism of the pioneer days which had an innate and unswerving desire that the industrial field should be kept clear of any obstacles that would hinder any man from starting a business that would rise as high as any in existence. When the industrial giants arose by internal growth or by fusion out of the very competition which was supposed to level all profits, the jealousy of the little firm and of the laggards in the race caused them to seek to impose legal handicaps upon the strongest and swiftest. But the unequal distribution of resources and natural ability made it certain that some would draw farther and farther ahead, as others would get more and more hopelessly behind. Loath to admit that the success was due to better business ability, cries of "foul," and "luck" were raised by the unsuccessful, and for these charges there was much warrant. Nevertheless, there were tremendous forces pushing us forward on the track of rapid exploitation of our resources and the development of tremendous industrial units, and all legislative and legal dykes and dams were as powerless to stem the tide as were the Statutes of Laborers in their effort to hold the English people in their customary ruts after the Black Death. The theory of individual causation—i.e. the attributing to one individual of the power to start such cyclonic forces—which the courts have applied in the trust cases, however applicable it may be in the cases of private contracts and torts, is nothing short of ridiculous when applied to such vast forces as we are now considering.

Thus the theories of both economists and courts have not fitted the facts of trust evolution. But there is little cause for regret. The forces involved have been too powerful to be affected by such theories. Forced perhaps to run underground or to assume shapes that were invisible to lawyers and economists, they nevertheless persisted and were not swerved from their course by all the obstacles put in their path. This may be a sad commentary upon the efficacy of any human control, but it is possible that we will save ourselves much grief if we do not attempt to master economic forces that are almost as powerful as the tides.

Positive Values of the Constitution

"There is no surer way in which to negative the propaganda of socialism, of communism, and of all the variant hues of either or of anarchy, than to demonstrate the positive value of the constitution in its guarantees to the individual."—*Philadelphia Bulletin.*

CURRENT LEGISLATION

It will be the purpose of this Department to bring to the attention of the bar the interesting changes in the fields of law which are being made by the legislatures. No person can be more alive to the possibilities of error, especially errors of omission, than the editors of the Department. The work of collecting the statutes for past sessions has been performed under great difficulty, but it is hoped that it will be more successful with greater experience. The notes in the department will be simply a statement of the law as it appears in the statutes, with little or no attempt at its interpretation through a discussion of the cases. It is hoped that members of the bar will co-operate in calling the attention of the editors to omissions and mistakes and in supplying them with important new statutes in their states. Only by such co-operation can the department succeed.

The New Tariff Act and Delegations of Legislative Power

THE establishment in 1919 of an official Legislative Drafting Service in both houses of Congress has resulted in marked improvement in the form and phraseology of many recent acts of Congress. It is evident that those sections of the Tariff Act of 1922 (315-317) authorizing the President to increase or decrease import duties for the purpose of equalizing costs of production and offsetting unfair methods of competition or discriminations in importing, are not the work of the official draftsmen. To the lawyer these provisions are among the most important in the new Tariff law. Their indefinite and confused phraseology suggests the criticism of an English court, that the legislators may have had an intent, but they had not expressed a legislative rule.

Section 315 authorizes the President after investigation of the cost of production of similar articles at home and abroad to "determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this act shown by said ascertained differences in such costs of production necessary to equalize the same." This broad power to change rates fixed by Congress is somewhat restricted by the further provision which confines executive increases or decreases within the limits of 50 per cent of the Congressional rates. The restraining effect of this limitation is, however, weakened by the provision permitting the President to further the equalization of production costs by imposing the ad valorem duty on the basis of the "American selling price . . . of any similar competitive article manufactured or produced in the United States." The power thus broadly vested in the President to increase Congressional tariff rates in accordance with his findings with respect to production costs at home and abroad raises anew the interesting question of the desirability and constitutionality of so-called delegations of legislative power.

The reciprocity features of the McKinley Tariff Act of 1890 provided that when the President should be satisfied that any other country producing specified articles which by this Act were placed on the free list was imposing exactions on United States products which "he may deem to be reciprocally unequal and unreasonable," he should proclaim the fact and thereupon such articles should pay the duties provided in the act. It should be noticed that the McKinley Act did not give the President power to fix rates, but only to determine which class of rates fixed by Congress should be applicable. Notwithstanding the contention that this reciprocity provision was an unlawful delegation of legislative power to the executive, the Supreme Court upheld the act (Field v. Clark, 143 U. S. 650). The court emphatically stated the general principle,—"that Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." But in its application of the principle the court found that the President "was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect."

Subsequent decisions of the Supreme Court have sustained acts of Congress prohibiting the importation of the "lowest grades of tea" and authorizing executive officers to fix standards (Buttfield v. Stranahan, 192 U. S. 470); prohibiting higher rates for shorter hauls, but with authorization to the Interstate Commerce Commission to permit the higher rate for the shorter haul (Inter-Mountain Rate Cases, 234 U. S. 475); prohibiting the exhibition of picture films without the approval of an executive board and authorizing the board to approve "only such films as are in the judgment and discretion of the board of a moral, educational or amusing and harmless character" (Mutual Film Co. v. Commission, 236 U. S. 230). In the Film case the court said: "Undoubtedly the legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply."

While our courts still insist upon the principle that the legislature may not delegate legislative power to administrative officers they recognize the necessity of general legislative rules with power in administrative officers "to fill in the details." This power to determine the detailed application of legislative standards may include power in administrative officers to make rules and regulations. All that is necessary is that the legislature prescribe standards sufficiently definite to enable the courts to determine whether administrative officers are keeping within the power delegated to them.

The Supreme Court of the United States has never held an Act of Congress unconstitutional be-

cause it delegated legislative power. In the case of Morrill v. Jones (106 U. S. 466) Congress provided for the admission, free of duty, of live stock for breeding stock under regulations to be prescribed by the Secretary of Treasury. One of the regulations prescribed required the animals to be of "superior stock." This regulation was held void not because Congress did not have the power to authorize the Secretary to make such a regulation, but because Congress had not evidenced in its enactment any intention to authorize the Secretary to attach the qualification of "superior stock" to the right of free admission.

Our courts have even sustained convictions under statutes making it a misdemeanor to violate rules and regulations made by administrative officers under power delegated to them by the legislature. In U. S. v. Grimaud (220 U. S. 506) the court sustained a conviction for violation of a rule of the Secretary of Interior forbidding the grazing of sheep on the public lands. In Howard v. State (242 S. W. 818) the court sustained a conviction for violation of a rule prohibiting the maintenance of cedar trees infected with rust.

Notwithstanding the existence of the power to delegate such authority the legislatures hesitate to place this power in the hands of administrative officers. Their attitude corresponds with the unwillingness of Parliament, though unrestrained by constitutional provisions, to delegate legislative power to executive officers. On the other hand, the extension of legislative regulation into new fields makes it difficult for the legislature to prescribe definite standards. Legislative standards must, however, be reasonably definite or they may be held unconstitutional, as in the case of the Lever Act, which imposed a criminal penalty for violation of a legislative requirement that prices of commodities should be "reasonable" (U. S. v. Cohen Grocery Co., 255 U. S. 81). A recent California Statute (Ch. 719-1921) prohibiting the shipment of oranges "when frosted to the extent of endangering the reputation of the citrus industry" was held too vague, indefinite and uncertain to furnish the basis of a criminal prosecution (In re Peppers, 209 Pac. 896). The court said in this latter case that the legislative provision was not only too indefinite to be enforced but it was also too indefinite to furnish the basis of the delegation of power to an administrative officer to make rules defining its application. In Ploner v. Standard Oil (284 Fed. 34) a delegation to an oil inspector of power to determine the fee for inspection was held void as unauthorized delegation of power.

These instances indicate that there are limits not only to the desirability, but also to the constitutionality of legislative delegation of discretion or rule-making authority to the executive. The provisions of the Tariff Act authorizing the President to increase rates to such an extent as he may find necessary to equalize costs of production and to offset unfair methods of competition or discrimination seem likely to stretch to the limit the power of Congress to hand over to the executive the difficulty of definitely determining the rule of law which in this case happens to be a tariff rate.

For the purpose of providing the President with the information necessary to exercise the power vested in him, the Tariff Act provides for investigations by the Tariff Commission. The provisions respecting such investigations, the finality of the findings of the Commission and appeals from the Commission to the Board of General Appraisers, the Court of Customs Appeals, and the Supreme Court, are evidently adapted from the provisions of the Trade Commission Act. It is provided that findings of the Tariff Commission "if supported by evidence shall be conclusive," but that appeal to the courts may be taken on "questions of law only." The judgment of the court on appeal "shall be final" except for review within three months by the Supreme Court on certiorari.

It is difficult to say just what is the effect of this provision giving finality to the determinations of the Commission after approval by the courts on appeal. A subsequent provision of the Act provides that if the President is satisfied of the existence of the unfair method of competition, for example, he is authorized either to increase the rate or to deny entry, and it is provided "that the decision of the President shall be conclusive." Either the appeal to the courts is useless or it should in some way control the decision of the executive.

THOMAS I. PARKINSON.

Association Policy and Bar Admission Standards

New York, Jan. 26.—To the Editor: In your January editorial columns you state that the American Bar Association, in starting a movement for raising the standards of admission to the bar, which must necessarily be a gradual process, was hardly under a logical constraint or moral obligation to make its own immediate demands for admission (to its own membership) conform to these standards.

Granted. But suppose that it were known that, in the case of applicants for membership who began their law study subsequent to the current year, preference would be shown to those who had received their legal education in law schools that maintain Association standards. Do you not think that this would constitute an immediate powerful incentive to intending law students to secure this sort of legal training in preference to legal training of another sort? Do you not think that failure to take this step suggests that, in the judgment of the Association, the sort of legal training that our future lawyers receive prior to their admission to legal practice is not, after all, a matter of paramount importance?

In the past, we all know that that portion of a lawyer's training which he received prior to admsision was of little importance in comparison with that which he received subsequently. But the law has become infinitely more complex now than it was when the present leaders of the bar began their studies. "The legal education which was fairly adequate under simpler economic conditions is inadequate today." The bar associations represented last year at the Washington Conference on Legal Education so declared. But are they ready to back up this declaration of faith to the extent of reducing somewhat the number of their new members? Very sincerely yours,

ALFRED Z. REED.

CURRENT POLITICAL AND ECONOMIC REVIEW

Freedom Restrained by Unofficial Groups—Real and Supposed Conflicts of Interests

INDIVIDUAL Liberty in Opposition to Public Rights is the title of a review by John Corbin of three books dealing with the Kansas Court of Industrial Relations in the *New York Times Book Review* for February 25. "Time was," says Mr. Corbin, "when freedom and justice were sufficiently safeguarded by protecting the individual from the irresponsible power of those who ruled him—specifically from a king. The happiest nation was that which was governed least. Today the people make their own laws, so that in a normally functioning republic there can be no real tyranny. In that old time, society and industry were, in point of fact, individualistic. There was no group, no organization, larger than the family and the commercial 'firm.' Today the nation is composed of a multitude of groups, of which organized labor is but one. The problem of government is to secure freedom of initiative and freedom from encroachment to these groups, one and all—to the railways, the steel industry, the coal mines and manufacturers' associations, no less than to organized labor. This is an undertaking that has in practice proved possible only to the industrial tribunal. The happiest country in the world of today is that which is governed most thoroughly and most effectually in detail." And the problem, he might have added, is not merely to secure freedom *to* these organizations, but to safeguard the freedom of individuals *from* their power, except where its exercise is more important for other desirable ends. In fact this is precisely what Mr. Corbin has in mind when he keeps deprecating the power of the coal and railroad unions, respectively, to freeze hospital patients and to "roast" nursing babies (by abandoning trains in summer on the desert). Though he overlooks, in his zeal, the fact that *either* side could put an end to the freezing and roasting by giving up the fight, and that consequently the sole blame cannot be put on either side without an appraisal of the merits of the particular controversy, the fact remains that he sees very clearly the important point that freedom from the power of the official government is no whit more precious than freedom from the power of the various organizations mentioned. Perfect freedom from restraint by the official government is attainable only under anarchy; and under anarchy, we might be even less free than now from restraint imposed by non-governmental groups and individuals. Moreover the interest we have in order, in safety and in security against famine, makes it worth while to sacrifice a certain degree of freedom. Therefore we do not insist on complete freedom from restraint by the official government; we subject the legislative power to the control, in a very rough sort of way, of the majority, and to certain limitations by the courts. Majority control is not always feasible in regard to the power exercised by non-official persons over the freedom of others; yet even so, that power may bring collective benefits more important than the personal freedom which it necessarily curtails. According to the economics of Adam Smith, indeed, the person who wields power over the economic life of others has no interest inconsistent with the interests of those others. Unfortunately, modern study in economics reveals many a discrepancy between the real interests of those who exercise power and those who submit to it—whether that power is exercised by business men or by labor unions. Where these discrepancies exist, we meet all the difficult problems of subordinating the exercise of the power to rules of law. These problems were considered last month. It must not be forgotten, however, that with all the flaws which have been disclosed in the classical theory of the harmony of interests, there is nevertheless a large field wherein that theory remains valid. Within that field, it is more important that the government be wise than that it be properly representative. A union may have power, for instance, to force an immediate advance in wages; yet if the wages are pushed beyond a certain limit, the impairment of the incentive of the capitalists may before very long react unfavorably on the laborers themselves. This point is brought out, with a certain degree of exaggeration, in an editorial, "The Vicious Circle," in the February *Stone & Webster Journal*. The evil arises here, not because the body which exercised the governing power was unrepresentative of the interests of the employer, but because it was ignorant of the true interests of the workers. In all such cases, and within the stated limits, enlightenment of the various parties (wherever practicable) would prevent the use of the power in the harmful ways indicated.

Technique of Group Government—Adaptation of Legal Methods

In other cases, the difficulty is not with real conflict of interests, or with ignorance of a real harmany of interests, but with lack of skill and judgment in the use of the governing power. Generally speaking, it is to the interest of most business men, as well as of laborers, to avoid periods of overexpansion, crisis and subsequent depression. A very clear account of such phenomena is given by Philip G. Wright of the Institute of Economics, Washington, in the February *Journal of the American Bankers' Association* ("Causes of the Business Cycle.") Despite their interest in avoiding them, many business men pursue policies which lead to crises. "At the beginning of every period of industrial depression," writes Professor O. M. W. Sprague in the *Harvard Business Review* for October ("Bank Management and the Business Cycle"), "a large majority of business borrowers suddenly discover that they owe overmuch to merchandise creditors and to banks. They find that they were too eager to take advantage of the alluring opportunities of the preceding year of business activity. That a more conservative course will be adopted on their own initiative by business men generally in similarly active periods in the future is altogether improbable. Boldness, enterprise, willingness to assume risks are qualities essential for the successful conduct of business affairs. He is an exceptional person who possesses these qualities in effective combination with caution and restraint. On the other hand, most men engaged in business may be expected to manifest some readiness to avoid extreme risks, if these risks are brought persistently to their attention by those in position to make their views effective in practice." Mr. Sprague proceeds to outline how the commercial banks throughout the country could exercise the restraining function beneficently, if they would assume a veto power over the decisions of the business men to expand their business. The economic reasons he sets out in full.

Meantime industrial and business activities will be profoundly affected by the decisions of the Federal

Reserve Board as to discount rates. This is pointed out in a significant article in the *Harvard Business Review* for January, entitled "Federal Reserve Bank Policy—The Need of a Definite Statement," written jointly by Professors Charles J. Bullock, O. M. W. Sprague and W. B. Donham. The writers believe that the policy of the Board should be to "limit the expansion of credit by raising and lowering discount rates in such manner and at such times that the volume of credit is determined by the real needs of the country whether these needs are seasonal or cyclical in their nature. Expansion should cease when the movement of prices threatens to become mainly speculative rather than related to fundamental conditions which require a larger amount of credit." "The difficulty in framing the policy will come not in determining the objectives to be attained but in the determination of the time when the policy is to be carried into effect through changes in the discount rates. There are various possible methods which might be used to fix the time when the expansion should be controlled. Before suggesting any such method it is desirable to emphasize the fact that any method stated in advance which will work with reasonable certainty and with generally proper results is preferable to a more accurate method not so stated and therefore leaving the business community entirely in the dark as to business prospects." Here is a field, in other words, where the Board should make its governing activities predictable—should formulate them into "law." And the method so formulated into "law," the writers indicate, might be changed in favor of some other method should Congress prefer.

The business executive still has much to say in making decisions which tend to accentuate or to modify the fluctuations of the business cycle, and he still wields power in other matters. Insofar as his true interests are not in conflict with those of others, or insofar as he is willing to subordinate his interests to those of the public, it is well that he exercise this power wisely. That his wisdom might be enhanced by a change in technique analogous to the change in the technique of judges in the early days of the common law, is the thesis of still another article in the new and valuable *Harvard Business Review*. This one (in the October number) is by Dean Wallace B. Donham of the Harvard School of Business Administration, and is entitled "Essential Groundwork for a Broad Executive Theory." "The new generation of managers," he says, referring to the 1920 crisis, "as it approached the conditions of 1920, had great need for records in usable form of the experiences of 1893, but no such records exist." Turning to the condition of the law in England and France from 1200 to 1300, he says: "In both countries the law was local to small territorial units. This corresponds to the present condition of business practices which are local to particular industries or companies. To a considerable extent also the decisions of the courts were based upon customs and upon the memory of each judge as to his own past practices." He proceeds to trace the development of the use of reported decisions in the law, and relates the progress which is being made along similar lines in business. "Something corresponding to these court reports and their digests is needed in business so that we may build up, as time goes on, a volume of recorded precedents which may be subjected to critical analysis and classification. The publication of such cases is an easy and inevitable development of the research which is the basis of the case system as we are now using it. We have therefore in preparation a volume which is intended to be the first of a series designed to help in the accomplishment of such a result." It will be most interesting to watch the experiment of the application to a fresh field of the familiar technique of the law, particularly at a time when the law finds it increasingly difficult to handle the great and growing mass of legal precedents. One suggestion Dean Donham makes regarding business case books should prove particularly applicable to the law—namely, that the record should include "some idea, wherever possible, of the success or failure of the method adopted" by the executive. What we have in the law is a record of the circumstances and of the judgment made by the court, but no record of how it worked. Of course no such record can be set down in law reports, but it may prove necessary to train judges and lawyers to supplement the reports with a study of the social and economic working of the rules therein contained. As Professor Thomas Reed Powell says concerning constitutional law in a recent book review ("Constitutional Interpretation and Misinterpretation," *New Republic*, February 7), no elixir of complete comprehension and wisdom "has yet been discovered, but we know at least that it must be compounded of analysis and appraisal of the interests and enterprises and relationships with which law deals and not merely of the law's ways of dealing with them. Here is work for generations of experts in many fields." (The review mentioned is an informed and interesting appraisal of recent works on the constitution by T. J. Norton, James M. Beck and Charles K. Burdick.)

Columbia University. ROBERT L. HALE.

The New Federalist Series

(*Continued from page 146*)

izens to make sure that they do not misuse the authority entrusted to them. Popular powers, however, though they may determine the character and scope of government, are in practice more frequently Negative or Deterrent than Positive. The people can more readily reject a course proposed to them than themselves suggest a better course. They can say, "We dislike this: we will not have it" on many an occasion when they cannot say what else they wish to have, i. e. in what form such general benefits as they desire ought to be given.

Of these three functions the most important and most difficult is that of choosing leaders, for though it seems simple to say that government must pursue the common good, the power to discern and decide in any given case what is good, and what Means best conduce thereto, needs a wisdom and unselfishness possessed by few. Since the people can seldom do this for themselves, their leaders must do it for them, and be held responsible for the consequences. A nation is tested and judged by the quality of those it chooses and supports as its leaders; and by their capacity it stands or falls.

Thus it may be said that without intelligent and unselfish leadership, democracy must fail. Such leadership is possible only if the representative principle in government is maintained in all its integrity. Substitute the vague impressions of the many for the convictions of their representative—and I am using representative now in its broadest sense—and the strong and self-respecting man will cease to lead. When we attempt to govern directly, there will be no need of leaders; and, by an immutable law of nature, we shall no longer develop them.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in Current Legal Periodicals

I. Among Recent Books

NEW York Law of Contracts, 2 vols., by Briscoe Clark. Ed. Thompson Co., Northport, New York. $15.00. The appearance of this book marks a step in the direction of the prophesy of the late Prof. Albert Kales, that we are being driven to the study of the law of each jurisdiction, rather than the law of the country as a whole. The book is remarkable for the completeness of its collection of the New York cases, useful in its noting all of the statutory changes, and will be found helpful for the way in which the subject is organized. It is too much to expect in such a book as much critical analysis as is found in books like Williston's. The preparation of such a work was a project worth doing, and it has been done reasonably well.

The Law of City Planning and Zoning, by Frank B. Williams, of the New York Bar. The MacMillan Company, New York. $5.00. A pioneer work by the man who has acted as a representative for New York City abroad, and who has been consultant for many cities of this country in matters of planning and zoning. It is published under the auspices of the Institute for Research in Land Economics. It makes such substantial contributions to this new field, that it will be eagerly sought by those interested in the subject.

Impressions of an Average Juryman, by Robert S. Sutliffe. Herbert H. Foster, 505 Fifth Avenue, New York. $2.00. This book is just what its title suggests. It will interest lawyers who want to see how they and the administration of justice appear in the eyes of a juryman of long experience, and with the ability to write briefly and interestingly.

In the field of international relations, two books deserve notice: *Cross Currents in Europe Today,* by Charles A. Beard. Marshall Jones & Co., Boston. $2.50. This general survey of the European situation is one of the most searching which has been made, and, of current books on the subject it is an outstanding contribution in its wisdom of conclusions.

Neighbors Henceforth, by Owen Wister. The MacMillan Company, New York. $2.00. This book by the well-known author of "The Virginian," is a series of snapshots of Europe during and following the War. The wide range of impressions vividly set out makes entertaining, and often quite informing reading.

Two general and elementary books on Government have appeared. *Social Civics,* by William B. Munro and Charles E. Ozanne. The MacMillan Company, New York. $1.72. This is a text book for teaching civics. It is unique in that it ranges in the fields of economics, sociology, and international relations, and in that it stresses so markedly the functional aspects of the various features of government studied.

"The Essentials of American Government," by Francis E. Thorpe. G. P. Putnam's Sons, New York City. $1.75. This book considers the subject of American government from the opposite viewpoint to that of the book just mentioned. In a concise and elementary way it attempts to state the essential abstract principles characterizing American government.

A particular study in the field of government is *The Employees' Compensation Commission,* by Gustavus A. Weber. D. Appleton & Co., New York City. It is one of the publications of the Institute for Government Research, being Service Monograph of the United States Government No. 12. It is a detailed study of the history, organization and administration of the United States Employees' Compensation Commission.

Two interesting and important titles in history are current: *The Causes of the War of Independence,* by Claude H. Van Tyne. Houghton, Mifflin Co., Boston. $5.00. This is the first volume of a history of the founding of the American Republic. It is written so as to lend itself to ready reading, and so as to disclose the truth concerning the causes of the Revolution, which were inaccurately revealed to us in the text books of our youth. The general reader will find it entertaining and extremely informing.

The Declaration of Independence, by Carl Becker. Harcourt-Brace & Co., New York City. $2.50. Following a careful textual study of the Declaration of Independence, the history of its drafting and passage is told. Its setting and its philosophical implications at the time and since its promulgation are carefully considered.

A few years ago a book was published by E. P. Dutton & Co., of New York, under the title of *Sixty Years of American Life.* In this book Everett P. Wheeler, so well known and widely honored, told what his experiences had taught him concerning American life and institutions from the time of Taylor to that of Roosevelt. The task which Mr. Wheeler set for himself in writing this book was done so carefully and painstakingly, and in its writing he drew from such a mass of interesting experiences, that a continued interest in the book on the part of the public is not to be wondered at.

A Critique of Economics, by O. Fred Boucke. The MacMillan Company, New York City. $2.00. The author is professor of Economics at the Pennsylvania State College. In the field of economic theory, this book is of outstanding importance. It is almost unique in addressing itself solely to the problems of methodology in economic thought. It undertakes to show in what sense economics is really a science, as opposed to a study of more or less disjointed values, considering this question in the light of recent developments in philosophy and science.

The International Trade Balance in Theory and Practice, by Theodore H. Boggs. The MacMillan Company. $2.00. The author is professor of Economics in the University of British Columbia. He sets forth accurately and somewhat fully the principles underlying the theory of the trade balance, together with some of their practical applications.

The Development of the Federal Reserve Policy, by Harold L. Reed. Houghton Mifflin Co., Boston. $3.50. An analytical and critical treatment of the policies underlying the Federal Reserve System by an author whose primary interest is exposition and not reform.

Industrial Pension Systems, by Luther Conant, Jr. The MacMillan Company, New York. $1.75. The author made an investigation of the pension problem for Bemis Bro. Bag Co. The material gathered in that investigation forms the substance of this book, and its principal value as an actual "case" study.

The Labor Movement and the Farmer, by Hayes Robbins. Harcourt-Brace & Co., New York City. $1.25. In this book, the author, who is a well-known student of the labor problem, undertakes to set out for the farmer what the labor movement is and how it affects his life and business.

The Agricultural Bloc, by Hon. Arthur Capper. Harcourt-Brace & Co.; New York City. $1.25. In this little book Senator Capper describes the causes, methods and results of the Agricultural Bloc, and outlines its present program of action. The book's subject has such widespread current interest that it is assured a wide reading.

Motor Insurance, by W. F. Todd, Sir Isaac Pitman & Sons, Ltd., London. $2.50. This a guide and reference book on the practice of English companies regarding motor insurance.

Property Insurance, by S. S. Huebner, Professor of Insurance and Commerce, University of Pennsylvania. So far as the book attempts presenting in a non-technical way the legal principles applicable to property insurance, it is of slight value to lawyers. To the extent to which it marshals the economic factors and business practices concerning property insurance, it will be welcomed by the young lawyer looking for the supplementary training, in the need of which his law school course left him.

Banking and Credit, by David R. Dewey, Professor of Economics and Statistics, Massachusetts Institute of Technology, and Martin J. Shugrue, Assistant Professor of Economics, Massachusetts Institute of Technology. Ronald Press Co., New York. $3.00. This is a text book intended for college and collegiate schools of business. It was written from the standpoint of the problems facing a customer seeking credit, rather than those facing one administering a financial institution.

Mercantile Credits, by Finley H. McAdow. Ronald Press Co., New York. $2.00. This is a practical study of a credit man's work on the problems involved in granting mercantile credits.

The A B C's of Business, by Henry S. McKee. The MacMillan Co., New York. $1.00. A worth while elementary discussion, intended to remove popular misunderstandings of fundamental matters in business, such as money, wages, banking, transportation, speculative trading, and marketing.

II. Current Law Journals

THE legal literature for February presents an unusual number of articles upon topics of general interest to members of the profession, as well as a number of helpful contributions upon more technical points. Three new journals have recently been added to the field. American Maritime Cases is the title of a new journal which began publication in January. It is published monthly, except July and August, under the auspices of The Maritime Law Association of the United States. It gives recent decisions of the more important maritime cases in full, with summaries of many other cases, together with articles upon points of unusual interest in maritime law. The journal fills in an admirable manner a long-felt need in this field. The Canadian Bar Review begins with the January issue. It is published by the Canadian Bar Association, Charles Morse, K.C., D.C.L., being the editor. This Review succeeds the Canadian Law Times and the Canada Law Journal, which have been incorporated with it. The University of Texas, in conjunction with the Texas Bar Association, has begun the publication of Texas Law Review, issued quarterly.

Of especial interest to those who are concerned with legal education, is the address by Cuthbert W. Pound, Associate Judge, New York Court of Appeals, upon "The Law School Curriculum as Seen by the Bench and Bar," delivered before the Association of American Law Schools, and published in Cornell Law Quarterly for February. Judge Pound discusses, in a most helpful manner, the questions, Is the ordinary law school curriculum adequate? What may the law school accomplish in teaching procedure, including evidence, pleading and practice? Should the law school teach local law or general legal principles?

In "An Inquiry Concerning the Functions of Procedure in Legal Education," a paper read at the Association of American Law Schools, and published in Michigan Law Review for February, Prof. Edson R. Sunderland has presented a question which is of vital interest to the bar in general. He discusses "procedure as practical professional ethics," points out the dissatisfaction of the laity with the moral attitude of the legal profession, finds a basis for the dissatisfaction in the non-moral attitude of the lawyer in the field of procedure, and makes the suggestion that the law school can materially assist in the acquisition of "an intuitive sense of the ethical values inherent in the choice and use of procedural processes."

"The Business Side of Practicing Law," by Roger Sherman, which appears in Illinois Law Quarterly for February, 1923, contains many practical suggestions, by the use of businesslike methods by a lawyer, for increasing his own returns, and for better performing his obligations to society and to his clients.

It is not often that a book review affords an opportunity for the reviewer to distinguish himself. But John M. Zane, in his review of Warren's "The Supreme Court in United States History," in the February issue of Illinois Law Review, in indicating "why this book under review is not perfect, but also . . . why every well-informed lawyer should make himself, by a careful reading, acquainted with the wealth of material which the author has made inviting," has done so in such an interesting manner as to make the review deserving of wide reading.

In view of the rapid growth of the movement toward the cooperative marketing of farm products, the article by Gerard C. Henderson upon "Cooperative Marketing Associations," which appears in Columbia Law Review for February, will be of unusual interest. In this article Mr. Henderson, "with a full realization that the subject is yet in its infancy,"

undertakes to make a "fundamental analysis of the legal principles applicable." The state laws under which such associations are formed, their status under anti-trust laws, and "the property rights and other basic legal relations involved in cooperative marketing," are discussed in a most thorough and helpful manner. In the same issue of this Review appears an article by Karl Nickerson Llewellyn, Yale Law School, upon "Supervening Impossibility of Performing Conditions Precedent in the Law of Negotiable Paper."

Two articles of interest particularly to students of criminology are "Suspended Sentence and Adult Probation," by C. S. Potts, in Texas Law Review for February, and "Proposed Reforms of American Criminal Law," by James Bronson Reynolds, to be found in the February issue of Yale Law Journal.

A most troublesome problem is discussed by Ernest G. Lorenzen in an unusually illuminating manner in Yale Law Journal for February, under the title, "The Statute of Frauds and the Conflict of Laws." Professor Lorenzen thoroughly analyzes the situation from the point of view of comparative law, and makes helpful suggestions of a solution. The same journal contains an admirable discussion of "The Limits of Judicial Discretion," by Prof. Nathan Isaacs.

"Ownership of Oil and Gas in Place" indicates the nature of the contents of an article in Texas Law Review for February by D. Edward Greer.

Virginia Law Review for February contains an entertaining account of the legal status of "The Fortune-Teller," by Blewett Lee, and a helpful discussion of the "Evolution of the Meaning of the Words 'Gifts Made in Contemplation of Death' in Inheritance Tax Legislation," by Russel L. Bradford.

John MacArthur Maguire brings to the front a question of serious moment, and presents many helpful suggestions toward its solution in "Poverty and Civil Litigation," in Harvard Law Review for February. In the same journal Warren H. Pillsbury begins a noteworthy discussion of "Administrative Tribunals."

Decisions bearing upon the "Domicile of an Infant" are classified and discussed by Prof. Joseph H. Beale in the February issue of Cornell Law Quarterly.

Of great interest to those who came to know Lord Shaw during his visit to America last summer, will be his address to the Canadian Bar Association, printed by Canadian Bar Review for January. The address is entitled, "Law as a Link of Empire."

Regulation of Sale of Securities in Interstate Commerce

(Continued from page 159)

been adopted in all modern countries which have enacted legislation on the subject in recent years, including France, Germany, Japan and several of the Latin American States.

The method here suggested would not compel every corporation to file papers with a Federal official. It would only require reports from those about to offer securities for sale in interstate commerce.

The information filed should contain a full disclosure of the economic and financial condition of the issuing company, its plans for the investment of the money secured from the sale of the securities, and other necessary facts which would assist the prospective investor in making up his mind as to whether he should purchase such a security.

In addition, such legislation should require every person, firm, association, individual or corporation offering securities for sale to the public in interstate commerce, to print on the front page of all circulars, prospectuses, letters, literature, and in the body of advertisements describing or listing the securities, in type larger than the type otherwise used, the names of the promoters and underwriters, the rate of commission, or commissions, or bonuses received by those promoting, consolidating, underwriting, or selling said securities, and the net amount to be received by the said sale, together with a statement that more complete information could be had by writing to Federal public officials, designated as the repository for such information.

Co-operating With the State Blue-Sky Officials

Apparently our Federal Agricultural Department approaches a high form of cooperation and efficiency in joining with our State agricultural colleges in administering and developing the agricultural industry in this country. Appropriations are made, officials appointed, and the laws administered by the Federal Government in connection with the agricultural schools along joint co-operative lines which commend themselves very strongly.

Since this can be done with respect to agriculture, why can it not be done equally well with respect to administering laws which will protect the investing public?

It seems to me that in addition to having a Federal "blue-sky" repository in Washington, a Federal Officer could be attached to State blue-sky commissions, and in the absence of such a State agency, with the office of the United States District Attorney. Whenever a corporation was selling securities in interstate commerce, a duplicate of the information filed with the Federal Government could also be filed with the official associated with the State Blue-Sky Commission, or the United States District Attorney in the State where the security was being offered for sale and advertisements of those offering securities for sale would notify the investor of this additional source of information.

In addition to this means of advertising information about securities, the law could provide that wherever it was discovered in a State that a sale of securities in interstate commerce was being initiated without compliance with the Federal law, it would be mandatory upon the United States District Attorney, upon affidavit of the designated Federal official at Washington, or the Federal official attached to the Blue-Sky Commission of the State, or upon the information of the United States District Attorney, declaring that the parties offering the securities for sale had not complied with the law regarding the filing of information, to present a petition immediately to the nearest United States Federal Court for a temporary order restraining the sellers of such securities from proceeding further, until an investigation could be completed.

Such a law would also provide that those failing to meet the requirements of the law would be subject to prosecution and on conviction either fined or imprisoned, or both.

In such legislation, it would be unwise for various reasons to make any exception save as hereinafter stated. Among others, that such a law must not only protect the investor, but must serve to promote his confidence. To develop his confidence, it is necessary to protect him in the case of all securities that are

issued, excepting of course those offered by municipalities or public utilities supervised by governmental authorities.

It may be said that the Stock Exchange already supervises the securities sold upon it. Nevertheless, there have been many securities offered on stock exchanges which were subsequently found to be waterlogged or loaded by those offering them to a degree that their demise was hastened.

To restore confidence in the public, such securities as well as those of the "wild-catter," should be subject to the regulations outlined above.

Moreover, a law making exceptions might lay itself open to an attack of discrimination, and therefore, of being unconstitutional.

It is the province, undoubtedly, and duty of the Government to protect its citizens, but it is questionable whether it is the province of a democratic form of government to take away the judgment of its citizens by substituting its own judgment as to what they may, or may not do with their own money, except under very well defined limitations.

If a bill such as I have outlined could be enacted into law, and that law carried every reasonable notice to the investor relating to the value of the securities which he was about to purchase, the responsibility would then be his, and he could indulge his own judgment. To go further might mean to block the channels of finance, and embarrass investment and development in this country. At least my own personal observation and study of this subject has led me to this conclusion.

Many parts of our country have been developed through speculative enterprises. There would not have been much of the advancement that there has been except for those who were willing, able and desired to take a chance.

Such a law as is contemplated would not deprive the American citizen of that chance but would put him on notice and give him every reasonable opportunity to discount the chance.

At the same time, its requirements, while not burdensome to the honest promoter, would be such that the one criminally minded, or ill-informed, would hesitate to go ahead. There are some who might still seek to deceive the public, but people of such mind would not be stopped by any law. Light thrown upon their securities through the publicity outlined or the possibility of the application of a restraining order by Government officials who could act very quickly by the processes described, would very likely make them pause if not altogether desist.

The answers to questionnaires sent out in the investigation of cases by the Commission indicate that a great many of those deprived of their savings are farm owners or employees of farmers. From this it is reasonable to deduce that the enactment of such a law would be of assistance to this class and, by means of protecting their savings, lesson farm tenancy which is so greatly on the increase in this country.

Moreover, it is maintained that the law indicated would be of value to the rest of our investing public, and turn many of the millions that are usually lost, back into legitimate channels for safe investment.

Finally there would not only be no conflict with the State laws for the regulation of securities but harmony and cooperation with them.

Commerce, Trade and Commercial Law Committee Meeting

The American Bar Association Committee on Commerce, Trade and Commercial Law will hold a public hearing at the Merchants' Association rooms, Woolworth Building, 233 Broadway, New York, Wednesday, Thursday and Friday, April 4th, 5th and 6th, for the discussion and consideration of the subjects set out below.

The Committee invites suggestions of topics for the meeting additional to those here stated and will distribute, shortly, a printed Agenda of the meeting.

Subjects to be considered:

Wednesday, April 4

(a) Senate Bill No. 2921 (Spencer), A. B. A. 1921 Rep., pp. 361-364, to amend National Bankruptcy Act.

(b) Senate Bill No. 2530 (Pomerene), A. B. A. 1921 Rep., pp. 332-337, to amend the Pomerene Bills of Lading Act in Interstate and Foreign Commerce.

(c) Senate Bill No. 4213 (Sterling), A. B. A. 1922 Rep., pp. 296-314, relating to Sales and Contracts to Sell in Interstate and Foreign Commerce.

(d) Senate Bill No. 4214 (Sterling), A. B. A. 1922 Rep., pp. 315-318, to make valid and enforceable agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the states or territories or foreign nations.

(e) Commercial Arbitration Treaties, A. B. A. 1922 Rep., pp. 294 and Appendix 321.

(f) Senate Bill No. 77, 67th Congress (1st Sess.) A. B. A. 1921 Rep., page 54 and A. B. A. 1922 Rep., page 289. Providing for Payment of Interest on Judgments against the United States for Money Due on Public Work.

(g) The legal status of Trade Associations and their functions.

II. Thursday, April 5

(a) Suggestions for the cooperation by this Committee with the National Conference of Commissioners on Uniform State Laws in their recommendations printed February, 1923, for amending Sections 32 and 38 of the Uniform Sales Act (State) and Sections 40, 47 and 20 of the Uniform Warehouse Receipts Act (State).

(b) National Merchandise Marks Act, A. B. A. 1921 Rep., page 312 and A. B. A. 1922 Rep., Recommendation 6, page 288.

(c) The consideration of a general system of United States Commercial Courts along the lines of the English Commercial Courts.

(d) Consideration of the Uniformity of the Law Merchant of North and South America.

(e) Consideration of a United States Industrial Court Act. See A. B. A. 1922 Rep., page 208.

III. Friday, April 6

(a) Consideration of United States Rules of the Road on Federal Highways and Post Roads in the interest of reducing automobile accidents and of securing unity of law governing motorists in States other than their residence.

(b) The bonding of the integrity of lawyers in their professional capacity.

(c) The solicitation of claims in bankruptcy and the representation thereof before the Referee and courts by persons, other than the owners thereof, not licensed as attorneys.

(d) Suggestions of other subjects and new businesses.

(e) Executive session.

A Blind Police Magistrate

"A blind man is eligible to hold the office of police magistrate, according to an opinion by Chief Justice Callaway, delivered by the Supreme Court of Montana in the case of Dan Shea, police magistrate in Butte, against Mayor Cockin and the city treasurer and city clerk. The mayor and the other city officials appealed to the Supreme Court on the ground that Shea was not qualified to serve as police judge because he is blind."—San Francisco Recorder.

JOHN LOWELL

Born 1856; Died 1922; Harvard, 1877; Harvard Law School, 1879

WHAT shall I say of him to enable others to understand and appreciate his nature, his character, and above all his characteristics, as I knew, appreciated and loved them all my life?

Characteristics, he was full to the brim with them and all different, almost contradictory.

Personality, no one I ever knew had so much, so striking, so unique a personality; attractive, almost alluring, too, it inevitably drew to him all his life long as friends all with whom he came in contact.

His enthusiastic, earnest, ardent partisanship was contagious, possibly infectious also. It invariably affected all who met him.

Descended on his father's side from a long line of New England ancestors, there was John Lowell, for 42 years minister of the Third Church in Newbury, afterwards the First Church in Newburyport.

Then John Lowell, appointed by Washington as the first judge of the United States District Court in the Massachusetts district.

His son John Lowell lived on a large estate in Roxbury, a man of wealth accumulated from his practice at the bar, a man of great attainments and one of the pioneers in introducing scientific agriculture and horticulture into this country. Francis C. Lowell, our John Lowell's great-grandfather on his grandmother's side, was a pioneer cotton manufacturer, so noted that the spindle city of Lowell bears his name.

Then John Amory Lowell, merchant, manufacturer, scholar, botanist and pre-eminently a man of intellect and culture.

For many years he managed and directed the Lowell Institute founded by his cousin, John Lowell, Jr., "for the free instruction and entertainment of the people of Boston forever." John Lowell, Jr.,' was John Lowell's great uncle.

This institute is now in charge of his first cousin, A. Lawrence Lowell, President of Harvard University.

Then came Judge John Lowell, his father, appointed by Lincoln to the position held by his great grandfather, judge of the District Court of the Massachusetts District, where he served with distinction so many years, being later promoted to the United States Circuit Court.

Then came John Lowell. By all the rules of inheritance, he should have been judicial, a calm logical reasoner, conservative and concise, a mathematician, but he was none of these. From his father's side he inherited steadfastness of purpose, character, endless determination—his character but not his characteristics, his nature, ardor, enthusiasm, charity, affection and love for people, causes, men, measures and nature.

No, these came from his mother, a daughter of George B. Emerson, a famous school teacher in Boston five generations ago, a lover of nature and botanist of note.

His mother it was whose boundless, ardent charity, hospitality, sympathy and love for people, children perhaps especially, caused old and young alike to throng to their two hundred year-old home in droves, sure of a welcome, sure of affection and sympathy, sure to feel at home in that hospitable "homey" atmosphere.

In this environment the John Lowell we knew grew up, with his intense love for nature, flowers, plants, trees, bugs, butterflies, animals and poultry, and especially Hamburgs, and Golden Spangled at that. He grew them, bred them, watched them, talked about them.

His earnestness and enthusiasm were contagious; one almost started a poultry farm next day.

So it was with college baseball, the Harvard nine, of which he was manager when in college,—his interest never flagged, never ceased. He followed every game, went to all he possibly could all his life.

In youth and as he grew to manhood, he never lost his hobbies, his enthusiasms, his friends, he annexed more, that was all. His sturdy intellectual Lowell ancestry showed in his everlasting persistent endeavor all his life to make the best of himself, his friends, his cause, his hobby. He exemplified the saying of his father's cousin, James Russell Lowell, "That is the best blood that hath in it the most iron to edge resolution."

From his mother he inherited his ardor, partisanship, affection, absorbing enthusiasm for whatever he was interested in at the moment.

He made himself a most successful lawyer; had at times, while he was counsel for an English liability insurance company well over 150 cases a year, accident cases, and some years he tried about 50 of them before a jury. Successfully, too, not so much because of his knowledge of the fine points of the law but because of his knowledge of human nature, of men, and because of his earnest, honest enthusiasm for his cause. He was the most in earnest of any man I ever knew and often his earnestness and sincerity carried conviction.

He had to believe in his cause. He clenched his fist and gritted his teeth and made himself believe in his cause.

He was never one of those who could make a plea for a cause he did not believe in at the time, but he could convince himself and hence others that his cause was right.

All his geese were swan.

He made himself a successful trial lawyer, one of the most prominent for many years. He was pre-eminent in getting a case taken from the jury or, if it went up to the jury, in puting the evidence on the record in the most favorable form for the trial of a bill of exceptions in the Supreme Judicial Court.

For 16 years he was on the Grievance Committee of the Bar Association of the City of Boston, and after he left that he was chairman of the Admissions Committee.

He was an ardent worker for the American Bar Association, was on its Executive Committee, and one of the Associate Editors of its Journal. He had a wide acquaintance with the leading members of the bar all over the country, and invariably the acquaintance of today was the friend of tomorrow, and for all time thereafter.

During the war he was chairman of the War Service Association at Washington, whose duty it was to provide the various government departments with lawyers all over the country who were competent to advise on all the complicated intricate questions that constantly came up—Income Tax, Military Intelligence, Shipping Board, Housing Corporation, etc., etc.

In this work he ably represented the American Bar Association. As his associate wrote, "He was equally at home with the Secretary of State or General Crowder as with a lieutenant in charge of a section of a subdivision or with a lad fresh from the Law School. He made friends with them all." "Mr. Lowell made the best of things."

That perhaps was the keynote of his character. He was an optimist. He made himself an optimist, he had to be an optimist, for if he once let go of himself, let his belief in himself, his cause, his friends, fail or even falter for long, he couldn't retain his steam, his ardor, his enthusiasm and earnestness. His interests and interest was boundless, not for his own affairs, not at all, but for yours and his country's as well.

His sympathy, charity, ever seeking occasion, opportunity, was shown when he was President of the Union Club in Boston and he started an Annuity Fund for the old, tired faithful servants. Went at it with ardor, enthusiasm, enlisted and buttonholed every one. The club members hadn't thought of it before.

It was shown when he became treasurer of the Harvard Loan Fund, established to loan money to deserving students to help them through college.

In dispensing the fund, he was the sympathetic, earnest, interested friend with a contagious and convincing belief in the youth's ability to make good. That helped too, mightily. It inspired self-confidence and induced earnest effort.

Legal adviser to the Associated Charities, more intensily interested than the actual worker or investigator who had the matter in hand, he woke them up, inspired new, more strenuous effort.

He was intensely interested in the Massachusetts General Hospital, its work and its welfare and its funds, when he was elected Trustee, in which position he succeeded his father and his grandfather and his great-grandfather, who was one of its prominent founders.

Friends, yes, hosts of them. Constant, yes; his old friends never lost their place in his affection, his ardent interest in them, their family, their welfare. They never lost their place, it was theirs for life; he merely annexed new friends, and the niches in his holy of holies were unlimited, like his mother's.

Hobbies, yes, new ones constantly, but the old ones were there just the same, the golden spangled Hamburgs were still there, but the silver and black had been added.

So with his interests, his heroes, his enthusiasms, never lost, never dimmed,—always ready to burst forth with enthusiastic encomium.

And he grew old, yes, apparently in body. He gave up his long runs and walks, stooped a little, grew somewhat grey and wrinkled, but all the time he was young in mind, in interest, in ardor, in enthusiasm.

He never lost his interest in his causes, his hobbies, his love and affection for his friends. He never lost theirs for him either. The eyes of the boy still looked out, glowed and sparkled with the arder and enthusiasm of youth, from the face of the man.

He was still whimsical at home, with his friends, his children and his grandchildren.

Still earnest and enthusiastic. It was still, "What can I do to help?" Still, "Come, we'll do it," never, "You do it."

He still loved his hens, his flowers, his home, his friends, his family, with all the warmth of youth. They were as much a part of himself, his life, on the day he died as on the day he left school or graduated from college.

No true living picture can be given of John Lowell, of his father or of his grandfather, if it is confined to attainments, intellectual capacity, occupations, be they public or private.

It was their home in which they really lived, were their true selves.

They never made their home, it was made for them by their wives. And what a home! Hospitable, comfortable, always homelike, always full of the children and grandchildren, nieces, nephews, relations and hosts of others as well.

How they loved their home, their family. How they nestled into the armchair near the lamp and in front of the fire and read or conversed. Did they light that fire? Not a bit of it. Some one else did that.

Mary Emlen Hale from Philadelphia, whom he married in 1883, made his home the sort of home the Lowell men had always loved, always had.

For some unaccountable reason these Lowell men were shy, retiring, almost reclusive in private life, and yet each one of them came out on occasion publicly with an unexpected dynamic force, stated facts, reasons forcefully with convincing logic, coherence and conciseness, always most effective and often entirely unlooked for, unexpected. They lived up to the motto on the Lowell coat of arms, "Occasionem Cognosce."

John, his father, his grandfather, were best in their homes, always gracious, interested, interesting, instructive, especially with the children. They all possessed that quiet, comforting manner that gave assurance of friendship, interest, sympathy, and made each one feel distinctly and personally at home.

Personality, they all had it to excess, but all were different, very different, each from the other.

As one met them, John, the tenth generation, was unique. He was emphatic always, talked right up, expounded his ideas, enthusiastically, earnestly always, with his head probably drawn down, a little on one side, with a smile a little awry, almost a grimace, with sparkling, glowing eyes, gritted his teeth and with emphatic gesture, one hand clenched beating his other palm to give more emphasis, if that hand wasn't on your shoulder or holding the lapel of your coat, and all in enthusiastic, earnest, yes, often extravagant language which he poured into your ears.

Constant always, lovable always, enthusiastic always, earnest always, his was a character, a friend, one will never forget. His personality was too striking, too vivid, too unlike others.

All the Lowells exemplified the motto that was inscribed in Latin on a panel in the home of John Lowell, Minister in Newburyport, "In essentials unity, in non-essentials liberty, in all things charity."

Still of them all the John we knew was the enthusiastic partizan, the outspoken ardent friend, the most extravagant, earnest expounder of his own thoughts and interests and of yours as well.

In life he well exemplified that paraphrase of Mathew Prior's precept:

"Be to thy friends a little kind,
Be to their faults a little blind.
Your generous impulse unconfined,
Then clap a padlock on the mind."

He preeminently, among Harvard's many sons, has lived up to the inspiring but for most of us unattainable motto, "Semper fideles."

WILLIAM D. SOHIER.

HISTORIC PERIODS IN THE DEVELOPMENT OF OUR LAW

By Hugh E. Willis
Professor of Law, Indiana University

THERE are five historical periods in the development of Anglo-American law. Dean Roscoe Pound has named these periods: 1. The Period of Archaic Law; 2. The Period of Strict Law; 3. The Period of Equity, or Natural Law; 4. The Period of the Maturity of Our Law, and 5. The period of the Socialization of Our Law[1].

The Archaic, or Primitive, Period in our law succeeded the period of no law, in early English history. The object of the law in this period was to secure the peace. Prior to this period every man had been a law unto himself. Vengeance and self-help had been the order of the day. The consequence of such a policy was unsafety for everyone. Hence the first effort of society was to preserve the peace. It undertook to do this by regulating vengeance. Individuals and families, however, then considered vengeance and self-help as things which peculiarly belonged to them. For this reason the first effort was not to destroy them, but to regulate them. This was done by substituting a composition for vengeance. The avenger was bought off. Roman law and Hebrew law had this same period in the development of their law. In Hebrew law it was characterized by the institution of cities of refuge and by the provisions for buying off the avenger. This period did not contribute very much law, but it marks a great step in the historical development of our law because it made the other periods possible. It established the principle that law should be substituted for lawlessness in the government of human relations. Through the years this principle has been applied more and more, until today there is very little of the principle of self-help left in the relations of one individual with another. What civilization we have is very largely due to the application of this principle. Unfortunately the principle has been applied only in the settlement of disputes between individuals. So far as social classes are concerned and so far as the larger units of the nations are concerned the law of England and the United Stated (and of the world), is still in its Archaic, or Primitive period..

The Period of Strict law followed the Archaic period. It began in Anglo-Saxon history and extended through Norman history as far as the sixteenth century. The purpose of law in this period also was security, but it attained this purpose, not by regulating primitive self-help, but by supplanting it so far as individuals were concerned and substituting therefor its own processes, or remedies. The law in this period was characterized by formality. When law was in the making people thought that their protection against tyrants lay in such formality. They sought this sort of protection before they would relinquish what they regarded as their right to obtain their own redress. But the consequence was that they created in their formality a greater tyrant than any against which they were trying to protect themselves, and that brought into existence the next or third period in our law. Most of the formality and technicality of the second period of our law has been ameliorated if not outgrown, especially in the field of substantive law; but in the field of adjective law, or procedure, at least in the United States, the law is to a large extent still where it was in this early period of Strict law, and some parts of our substantive law, like real property and consideration in contracts, still bear the marks of Strict law.

The Third Period in the development of our law was Equity (or natural law in other systems). In this period, which extended from the sixteenth through the seventeenth and into the eighteenth century, the pendulum swung to the opposite extreme. There was such a revulsion against the law of the Strict Period that justice was administered for a time by a new system of courts which sprang into existence, with almost no formal rules. The end of the law in this period was justice. There was a tendency to identify law and morals, and to emphasize duties rather than remedies. This was essentially a reform period, and after it has remedied the most glaring defects of the law as it emerged from the period of Strict law and as it had been administered by the common law courts, the pendulum again swung backward towards the period of Strict law, and as a consequence we got the period of the Maturity of our law.

The period of the Maturity of our law ran from the eighteenth through the nineteenth century. The end of law in this period was equality of opportunity and security of acquisitions. Security became an end of law again, as in the strict period, but the influence of equity was not entirely eliminated. The pendulum did not swing all the way back to Strict Law. However, the swing was far enough so that form and technicality again began to have a large place. Rights were emphasized rather than the correlative duties which Equity had emphasized. Property and contract became the all important considerations. Individualism and freedom of contract were the universal "cure-alls." The law would probably have taken this development if there had been no other outside factors contributing to this result, but the development was undoubtedly accelerated and given momentum by the philosophies and economic theories of the day. This was the period of the "natural rights of man," of "laissez faire," the "law of competition," the "law of supply and demand," and of "individualism." Our bills of rights, the Declaration of Independence and other immortal documents were written in this period, and that of course accounts for the philosophy and economic theories embodied in them, although this fact is sometimes forfotten. The result was an over-emphasis of legal rights. Dissatisfaction, perhaps more unconscious than conscious, again arose; and just as the pendulum swung

1. Pound: The End of Law as Developed in Legal Rules and Doctrines, 27 Harv. L. Rev. 195; The End of Law as Developed in Juristic Thought, 27 Harv. L. Rev. 605, 30 Harv. L. Rev. 201; Interests of Personality, 28 Harv. L. Rev. 343, 445; Equitable Relief Against Defamation and Injuries to Personality, 29 Harv. L. Rev. 640; The Spirit of the Common Law; An Introduction to the Philosophy of Law. The writer wishes to acknowledge his indebtedness to Dean Pound, not only for what may be found in this short article, but for the help he has received in coming to an understanding of the historical development and the philosophical and sociological principles underlying our entire system of Anglo-American law, and for the stimulation and inspiration which Mr. Pound's writings always give.

away from the second to the third period of our law, so it swung away from the fourth to the fifth and last period.

The present period in the historical development of our law, which Dean Pound has called the period of the Socialization of our law, began with the twentieth century, but when it will end cannot at the present time be told. The chief characteristic of present law is the emphasis of interests. The natural result of the over-emphasis of rights in the period of the maturity of the law was to raise the question of why individuals had their rights. The answer was, because there was a social interest that they should have them. When this was discovered, people also discovered that there were other social interests than those which had been emphasized in the nineteenth century, and the consequence was a new period of development in the law. People saw that the historical order was not the natural order but that historically the natural and logical order had been reversed. Individuals had rights and duties because only thus could certain social interests be secured, and remedies were given as a means of enforcement of such rights and duties. Hence social interests have become the all important things. Unless rights and duties and remedies are furthering some social interest there is no sufficient reason for their existence. If one social interest is more important than another, the one of less importance must yield to the other. The end of the law has now become the satisfaction of as many human wants as possible; to make legal justice social justice; to give fair play between groups as well as between individuals. This has given us what has been called sociological jurisprudence, as the jurisprudence of the twentieth century. The chief exponents of this jurisprudence are von Jhering in Germany, Leon Duguit in France and Roscoe Pound in the United States. There is a close relation now, as in the nineteenth century, between law and the other social sciences and philosophy, but philosophies and economic theories have changed.

There are some people even in the legal profession who do not know that our law has had these five periods in its development. There are people teaching law, and practicing law, and administering law from the bench who think of the law as having only one period and that the period of their own mental development. If that happens to be the period of strict law, they want the law strict law; if the period of Equity they want the law equity, and so on. They can't realize that the first thing to do in accounting for a decision unless it was by a court like themselves is to find out the period in which it was decided. These men cannot realize that the law of the twentieth century is different from the law of the nineteenth century. Yet that such is the fact is very easy of proof. Uses of property which were upheld as rights in the nineteenth century will not be tolerated today with its scheme of social interests. For example, a spite fence is no longer legal, property may be taken in the exercise of the police power for esthetic purposes, the right of a husband to dispose of his property is limited so that he must have his wife join in the conveyance, the powers of creditors and other injured parties are limited by the exemption laws, and things formerly classed as res communis and res nullius are now classed as res publicae. Freedom of contract is being limited by taking the law of insurance and the law of public callings out of the realm of contract, and by making more and more things illegal as the subject-matter of contract. Liability, as in the workman's compensation laws, is being imposed without fault. Society is taking an interest in the dependent members of the household. Taxation laws are not based now on the principle of equality but on the principle of ability to pay. If it was not for this change of theory our graduated income tax laws and our graduated inheritance tax laws would be unconstitutional. Important movements for the reform of legal procedure are being inaugurated. Yes. Our law has always been in process of change. Changes are now going on in it. This is right. To say that our law should remain what it was at the end of the nineteenth century would be as foolish as it would be to say that it should be what it was in the time of William the Conqueror. What it will be in the future, no one can say with authority. Its future will depend upon its best development and the desires of society. It goes without saying that it will be something different from what it now is or ever has been.

Newspaper Publicity and Crime

"Comment has been current of late in legal publications as to 'trial by newspaper,' meaning thereby the tendency of the press to give continued and sensational publicity to a 'murder mystery.' Much there is in this phase of journalistic enterprise which is worthy of condemnation. Innocent people are given a disagreeable publicity, and suspicions are engendered on mere speculation which linger for years in the popular mind. Yet there is a consideration favoring such publications which is rarely adverted to. By the Statute of Winchester (13 Edw. I.) 'from henceforth every county shall be so well kept, that immediately upon robberies and felonies committed, fresh suit shall be made from town to town, and from county to county; and that hue and cry shall be raised upon the felons, and they that keep the town shall follow with hue and cry, with all the town and the towns near; and so hue and cry shall be made from town to town until they be taken and delivered to the sheriff.' The 'hue and cry' has gone out of existence. In its day, it was the only means of communicating the news to the people that they might be alert to capture a fleeing felon or communicate to the authorities evidence where the offender was unknown. The press has taken its place as an instrument of public intelligence, and so when a dead body is found in the public street or in a lonely field it but fulfills an ancient function when it cries 'Murder! Murder!' up and down the land. Local authorities may be supine, incompetent or even corrupt. Being unable or unwilling to apprehend the criminal they are all too willing to let the matter be hushed up and forgotten. But with that cry ringing daily in the land it cannot be forgotten; higher authorities are roused to ask why the criminal has not been found; ofttimes those bound by interest or favor to silence become afraid longer to keep silent. The criminal hearing the hue and cry ever behind him may by some rash act betray his guilt. Of course to the lawyer's mind the manner in which the press presents the matter is intolerably shallow and sensational, but such is the nature of our people that nothing less would arouse continued interest. It is open to argument whether the administration of law would not be better if the glaring calcium light of newspaper publicity rested on it more frequently and was not reserved for cases involving some morbid sex theme."—Law Notes, (Feb.).

STATE AND LOCAL BAR ASSOCIATIONS

Recodification of State Laws Urged in Arizona—State Association Organized in Delaware—Idaho approves more Careful Scrutiny of Qualifications of Applicants for Admission—New York Urges Participation in Permanent Court of International Justice—Other News

ARIZONA

Recodification of State Laws Urged by Association

The Arizona State Bar Association held its annual meeting at Phoenix on February 3. It was decided to urge the legislature to name a commission to re-codify the laws of the state, and the president of the Association was named a committee to draft a bill to be submitted for the guidance of the legislature. The following officers were elected for the ensuing year: President, James R. Molott of Gila county; Secretary, James E. Nelson of Maricopa county; Treasurer, C. F. Gerard, Maricopa county. A number of bills pending before the legislature were discussed.

DELAWARE

State Bar Association Organized — Special Committee Will Carry on American Citizenship Work

The Delaware State Bar Association was organized on February 21, with the following officers: President, Josiah Marvel, Wilmington; First Vice-President, John Biggs, Wilmington; Second Vice-President, Henry Ridgely, Dover; Third Vice-President, Charles W. Cullen, Georgetown; Secretary, Leonard E. Wales, Wilmington; Treasurer, Thomas C. Frame, Dover.

The President was authorized to appoint an Executive Committee and other usual committees, and was further empowered to name two special Committees, one to prepare a code of ethics for the Delaware Bar, and one to carry on the work of American Citizenship in this State.

IDAHO

Bill for Organization of Bar Approved at Biennial Meeting—Better Investigation of Qualifications for Admission Recommended

The biennial meeting of the Idaho State Bar Association convened at the Federal Court Room in Boise, January 3, 1923, President James F. Ailshie of Coeur d'Alene presiding. The sessions continued January 4 and 5. The first session was given over to reports of standing committees of the Association, of which one, that on Judicial Administration and Remedial Procedure, presented by John C. Rice, former Chief Justice of the Supreme Court, occasioned considerable discussion of the appellate procedure, and of the desirability of having rules of practice formulated by the Supreme Court rather than by the Legislature. The matter of proof of devolution of the wife's interest in community property, upon her death, which has been a source of trouble to attorneys of this state for a long time, was the subject of a report and recommendation for remedial legislation, and was referred to the Legislative Committee.

The President's address, delivered Wednesday evening, brought forth unusual and spirited discussion, resulting in the adoption of a motion commending and endorsing the views of the President, relating to the strengthening of the organization for bringing about the highest ethical standards.

Thursday had been set aside as Judicial I and Charles F. Reddock, former District Judge, addressed the Association upon matters which had come to his attention while on the bench. John C. Rice, former Chief Justice of the Supreme Court, spoke of the problems facing that Court in the disposition of cases, his address being followed by discussion in which all members of that Court joined. This discussion resulted in the passage of a resolution addressed to the Court, and expressing the belief that business might be expedited by the division of the Court into departments and by the delivery, wherever practicable, of memoranda opinions.

In the evening Frank S. Dietrich, United States District Judge, spoke of "Ethics of the Bench and Bar," at the conclusion of which resolutions, previously presented by the State Grievance Committee, were adopted, relating to the obligation of attorneys to assist in matters of grievance, and recommending to the Supreme Court the adoption of the Code of Ethics of the American Bar Association as a rule of Court, and of a rule requiring more careful investigation of the qualifications of applicants for admission to practice. Legislation for the establishment of a small claims court was also discussed, and approval of the idea was given.

The bill for the organization of the Bar, which was approved by the Association two years ago, and failed of passage by the Legislature at that time, was again presented, discussed and approved with slight amendments, on Friday morning. It was then referred to the Legislative Committee for introduction in the Legislature now in session.

An interesting address on "Public Service and the Bar," by O. P. Cockerill, Dean of the College of Law, University of Idaho, followed. The Governor of Idaho, C. C. Moore, spoke briefly at the afternoon session, advocating economies in matters affecting the courts, which met the ready approval of the Association, expressed in the unanimous adoption of a resolution thereon.

The following were elected to hold office until the next meeting: President, John C. Rice, Caldwell; Secretary-Treasurer, Sam S. Griffin, Boise; Members Executive Committee—C. H. Potts, Coeur d'Alene; G. H. Van de Steeg, Nampa; C. E. Crowley, Idaho Falls; Vice-Presidents—First District, A. H. Featherstone, Wallace; Second, O. P. Cockerill, Moscow; Third, C. F. Reddock, Boise; Fourth, A. F. James, Gooding; Fifth, W. H. Witty, Poca-

tello; Sixth, A. S. Dickinson, Blackfoot; Seventh, Alfred F. Stone, Caldwell; Eighth, G. H. Martin, Standpoint; Ninth, C. A. Bandel, Rigby; Tenth, Eugene O'Neill, Lewiston; Eleventh, H. A. Baker, Rupert.

The sessions closed Friday evening with a banquet at the Chamber of Commerce, at which A. H. Connor, Attorney General of Idaho, presided, and C. H. Potts, D. A. Callahan, Justice Charles P. McCarthy, and John C. Rice, responded to toasts. Vocal solos were rendered by Clarence T. Ward of the Boise Bar.

SAM S. GRIFFIN, Sec'y.

NEW YORK

State Association Urges Participation in Permanent Court of International Justice

At the forty-sixth annual meeting of the New York State Bar Association, held the latter part of January in New York City, a resolution was adopted recommending to President Harding that he propose that the United States join in the treaty for the creation of an International Court of Justice. The resolution was contained in a report made by the Association's committee on International Arbitration. Another resolution was adopted directing the President of the Association to appoint a committee to confer with Governor Smith, the legislature and the Court of Appeals with regard to the organization of the bar of the state along lines now generally familiar.

President Guthrie's address, among other matters of importance touched on, commended the idea of a permanent organization to promote the systematic improvement and development of the law—an idea which has since taken form and substance—as the most practical and encouraging of all the movements so far initiated. Judge Alphonso T. Clearwater of Kingston, delivered an address urging greater restriction on immigration and the entire exclusion of certain types of immigrants from citizenship. Mr. Martin Conboy delivered an address in which he advocated the creation of a self-governing bar organization, and Senator George Wharton Pepper of Pennsylvania made a very timely speech on "Some Aspects of the International Situation." A resolution to create a judicial section of the association, similar to that of the American Bar Association, was unanimously adopted.

The meeting closed with a banquet at which former United States Attorney General George W. Wickersham, Representative Ogden L. Mills, Newton W. Rowell, K. C., of Canada, Judge Frederick E. Crane of the Court of Appeals, and Supreme Court Justice John Procter Clarke, made addresses.

ST. LOUIS

Interesting Series of Lectures Announced

The Bar Association of St. Louis has announced an interesting program of lectures on the general topic, "The Growth of American Administrative Law." The first lecture announced is a "Historical Survey," by Dr. Ernst Freund of the University of Chicago, on March 12. The other lectures in the series are as follows: March 19, "Interstate Commerce Commission," by Hon. Robert V. Fletcher, General Solicitor Illinois Central Railway and former Justice of the Supreme Court of Mississippi; March 26, "Federal Trade Commission," by Hon. Joseph E. Davies, of the Washington, D. C. Bar, Former Chairman Federal Trade Commission; April 2, "Constitutional Aspects of Administrative Law," by Hon. Cuthbert W. Pound, Judge New York Court of Appeals, Former Professor of Law, Cornell University, and Trustee of Cornell University; April 9, "State Public Service Commissions," by Hon. John A. Kurtz, Chairman Public Service Commission, State of Missouri; April 16, "Federal Departmental Practice," by Hon. Charles Nagel, of the St. Louis Bar, Former Secretary of Commerce and Labor and Director Washington University.

BRIEF NOTES

Mr. Robert E. Gordon was elected President of the Mobile Bar Association at the recent annual meeting. Other officers chosen for the ensuing year were : E. G. Rickarby, first Vice-President; Jack Courtney, second Vice-President; Cecil F. Bates, Secretary and Treasurer.

Bills fathered by the St. Louis Bar Association and aimed at questionable practices of attorneys, have been introduced in the Missouri House of Representatives. One of the measures strengthens the statute providing that an attorney may be disbarred on charges of committing certain offenses, without the necessity of conviction in the criminal court. Another attacks "ambulance-chasers," and the third makes releases of claims of causes of actions, procured through solicitation within two weeks after the cause accrued, voidable within three months at the aggrieved person's option.

The newly-formed Hamilton County (Ind.) Bar Association recently elected J. A. Roberts President for the ensuing year; Judge Hines, Vice-President; and Ralph Waltz, Secretary-Treasurer.

Judge Frank L. Martin was elected President of the Reno County (Kan.) Bar Association at its recent meeting, and E. T. Foote, Secretary and Treasurer.

Three hundred members of the Kansas City (Mo.) Bar Association recently held a meeting in honor of Judge J. E. Guinotte, for thirty-six years judge of the Probate Court of Jackson County.

Illustrative of the practical side of the Bar Association of today is the creation of a Committee on Appointments by the Association of the Bar of the City of New York, to aid members of the Association and others to secure high-class assistants. The committee purposes to issue, from time to time, bulletins which will be sent to members of the Association, listing positions available and applicants with their qualifications. It frequently happens that men find themselves in positions to which they are not suited, and the committee hopes to be of help in such cases.

More than one thousand persons were present at the annual dinner of the New York County Lawyers' Association, held on February 24. Simplification of legal procedure was the keynote of most of the speeches. The speakers were former Secretary of State Bainbridge Colby, Job E. Hedges, Miss Mabel Walker Willebrandt, assistant to the Attorney General of the United States, and Judge Charles M. Hough of the United States Circuit Court of Appeals. Former U. S. Senator James A. O'Gorman was the toastmaster.

Press Comments on Proposed Code of Judicial Ethics

Reads Almost Like an Indictment

The committee that drew up these canons consisted of Chief Justice Taft, two other Judges and two eminent lawyers. The time and care they have given to their work only go to show how pressing Chief Justice Taft and his associates consider the need for insisting on higher standards of judicial conduct. For if there was nothing to criticise, nothing wrong, no improprieties or irregularities to be corrected, what occasion would there be for these primary-grade lessons in judicial ethics? If Judges had nowhere transgressed by accepting presents or favors from litigants or lawyers, or made indiscreet investments or speculated on margin, why go so elaborately into the nature of these offenses against judicial ethics? In the circumstances the public may fairly ask, What is it all about? What are the American Bar Association's special committee, Chief Justice Taft and the others, aiming at? For the thirty-four canons submitted come very near reading like an indictment, with the names omitted—New York World.

Code Upholds Exalted Ideal

It is a voluminous document and covers in detail practically every phase of judicial conduct and lays down a course of action and upholds an ideal so exalted that not many wearers of the ermine can hope more than to approximate to their complete attainment. Nevertheless, the very formulation of the principles here expressed, and by an authority such as this is, is proof enough that there are Judges who need some such ethical reminders as are here contained—Philadelphia Public-Ledger.

High Standard of Judicial Propriety

These are only two or three points that show the general high tone of the standard of ethical propriety, which dominates the entire report. There is plenty of room off the judicial bench for anyone who regards that standard as too seriously restrictive of individual freedom. —Columbus (O.) Dispatch.

The Gist of the Code

This gist of the code is contained in a single sentence: "A judge's conduct should be above reproach." If the fountain of justice be not pure, all that flows from it is suspect. The harm a corrupt judge may work is incalculable. Actual corruption on the bench is no doubt rare in these days; but less serious offenses impair the authority of the bench and the respect due to it. Judges should be shining examples to the legal profession in propriety of conduct. If there are those who fall short of this high standard they should well and wisely consider the ideal that the Bar Association sets before them. There is reason for believing that too many lapses from this ideal are illustrated by politically appointed judges who fail after appointment to keep out of politics. If our American judiciary has a besetting sin, this is it.—Philadelphia Record.

Assignment Discharged in Full

The committee's report was published this week and the proposed code appears to discharge in full the assignment it was given. It had recourse to the Bible for fundamental principles, quoting under the heading "Ancient Precedents" Deuteronomy on the duties of the judge. Also it made extracts from Francis Bacon's essay on "Judicature." The modern judge who accepts the proposed canons as his personal code may be expected to be uplifted in spirit and present an example of conduct to his fellow men that they emulate with profit. All of the principles stated are appropriate for instruction of laymen as well as judges.—Pittsburgh (Pa.) Gazette-Times.

Judges Should Avoid Appearances of Evil

Sometimes it can be said that a judge's point of view too greatly influences his decisions. Sometimes judges become autocratic. Often they are disposed to procrastinate and to defeat justice by delaying it. None of these failings creates quite the same despair for democracy as the occasional evidence one has of intimacy between judges and politicians who are not above asking favors. When a litigant stands in court and sees an influential friend of the other party whispering familiarly to a smiling jurist, one gets sick at heart. For if courts can be influenced, where is justice? Actually, of course, a judge may smile and smile and be a judge, for all the politicians. The careful jurist avoids the very appearance of evil.—Richmond (Va.) News-Leader.

Will Be Much Interest in Canons

There will be much interest in the canons for the guidance of judges in their conduct, both on and off the bench, formulated by a Committee of the American Bar Association of which Chief Justice Taft is chairman.

Most of the rules laid down by the committee prescribe or forbid conduct that is on its face so manifestly proper or improper that it is surprising that there should be any need to say anything about it. Yet it is well that there should be condemnation of the making of promises by elective judges during a campaign in return for support.—Indianapolis (Ind.) News.

A Splendid Statement

Chief Justice Taft's committee of the American Bar Association has completed and published the canons of judicial ethics which it was appointed to draft. It is a distinguished committee, and the code which it has compiled is a splendid statement of the ideals which a judge should cherish and the rules by which his conduct should be guided.—Albany (N. Y.) Knickerbocker Press.

No Paragraph Can Be Subtracted

Judges and lawyers are invited to scrutinize and amend the proposed canon of judicial ethics formulated by a committee of the American Bar Association, having Chief Justice Taft and Chief Justice Von Moschzisker of Pennsylvania as the representatives of the judiciary. Changes in verbal expression are possible, but so far as the substantive code is concerned no paragraph, section, principle or provision can be subtracted as imposing too rigorous a standard of conduct on the man selected to administer even-handed justice.

In general, rules are prescribed whereby the persons entrusted with judicial obligations may hold themselves above reproach. These rules are but the special application to the Judge's office of ethical standards which are of universal application, supplemented by such qualities of patience and impartiality as a Judge must possess in the highest degree. But the canons also include a few paragraphs which cover matters which have arrested the attention of the public and invited hostile criticism.—Philadelphia (Pa.) Bulletin.

Freak Sentences

The code for the conduct of judges submitted to the American Bar Association by a special committee contains a pronouncement against freak sentences. "Justice," says the report, "should not be molded by the individual idiosyncrasies of those who administer it."

There can be no doubt that the freak sentence often meets public approval, sometimes appealing to one's sense of humor as well as to one's sense of appropriate expiation. There can be no doubt either that it has been very much overdone or that in the long run uniformity of penalty is a far sounder way to "make the punishment fit the crime" than leaving punishment to the whims of judges.—Evening Sun (New York).

Ethics for Judges

To the conscientious and thinking lawyer none of these things are new. He would suppose that a man fit to be a judge would hold to such rules of conduct without having them laid down for him. But we are not likely to have judges that will all be without flaw, because men are human and some poor judges are bound to reach the bench. We shall, moreover, always run the risk of having bad men on the bench, so long as our judges are elected to the bench as partisan candidates. If the two great parties could but agree to take turns in naming candidates for the bench and to retain on it men that have proved their fitness for judicial position, the evils now discernible upon our bench would soon be dispelled.—Rochester (N. Y.) Post-Express.

There is an apparent discrepancy a

The pages are either missing or the

The filming is recorded as the book

ncy at this point.

or the pagination is incorrect.

book is found in the collections.

Statement by the Committee on Federal Taxation

IN its closing hours Congress passed an important amendment to the Revenue Act of 1921, which should be carefully studied by every attorney interested in income, excess-profits and war-profits taxes, as it materially affects the time for filing claims for refund and credit, especially for 1917 taxes.

This Act of March, 1923, amends Section 252 of the Revenue Act of 1921 so its provisions relating to time of filing claims for refund and credit as amended now read as follows (Amendment in italics):

> Sec. 252. (a) That if, upon examination of any return of income made pursuant to this Act [and other Revenue Acts specified], it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, nothwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer, *or unless before the expiration of two years from the time the tax was paid a claim therefor is filed by the taxpayer: Provided further, That if the Taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, such credit or refund shall be allowed or made if claim therefor is filed either within six years from the time the return for such taxable year 1917 was due or within two years from the time the tax was paid.*

This amendment makes the following important changes in the law:

(1) Taxpayers who have filed waivers of their right to have the taxes due for the year 1917 determined and assessed within five years after the return was filed, now have *six years* instead of five years from the time the return for the taxable year 1917 was due to file claims for refund or credit.

(2) Taxpayers who have not filed such waivers are entitled only to file claims for refund or credit within *five years* and *not six* years after the return was due, *or within two years after the tax was paid.*

In view of the recent ruling of the Commissioner that the tax returns for the calendar year 1917 were due April 1, 1918, taxpayers intending to file claims for refund or credit for that year should either file waivers *and have them accepted by the Commissioner* or file their claims for refund or credit before April 1, 1923.

It is also possible that this Act of March 4, 1923, annuls the effect of Treasury Decision 3416, and notwithstanding Section 3228 Revised Statutes, as amended by the 1921 Revenue Act, cuts the time for filing claims for refund or credit from four to two years after payment of tax, unless such claim was filed within the now statutory period after the return was due.

This Act of March 4, 1923, also contains a further and most important amendment to Section 3226 Revised Statutes, which limited the time to bring actions in Court to recover taxes illegally paid to five years from the time of the payment of tax by adding the words *"unless such suit or proceedings is begun within two years after the disallowance in whole or in part of such claim for refund or credit."*

A Treasury Decision construing this Act of March 4, 1923, will probably soon be issued, but meanwhile taxpayers and their attorneys should carefully examine the situation and ascertain how their interests are affected by this change in the law, which, as to many taxpayers, including all who have already filed waivers, is exceedingly beneficial, and for that reason was strenuously supported by the Committee on Taxation.

CHARLES HENRY BUTLER, *Chairman.*
GEORGE M. MORRIS, *Secretary.*

The Novelist's Law

"The novelist's law is unsually fearfully and wonderfully made. Thus a butcher is represented as putting in the Sheriff on non-payment of his bill without troubling the law Courts at all in the matter, whilst it is quite frequent for a claimant to appear as demanding an estate when the statutes of limitations would long ago have extinguished such rights as he ever had. In 'Felix Holt' the authoress wished to restore possession to a family that had been parted from the land for a century. She consulted Mr. Frederic Harrison on the subject. He bethought him of the device of a base fee, whereupon, the issue of a tenant in tail becoming extinct, the land goes back to the descendants of the original owners. The late Lord Herschell concurred in the soundness of the device. Thus the history of the Transome estates in the novel mentioned is sound from a legal point of view."—Ex.

Official Directory
1922-23

President

JOHN W. DAVIS.....New York, N. Y.

Secretary

W. THOMAS KEMP.....Baltimore, Md.
901 Maryland Trust Building

Treasurer

FREDERICK E. WADHAMS.....Albany, N. Y.
78 Chapel St.

Executive Committee

President, Secretary and Treasurer, *ex officio*

W. O. HART, *ex officio*.....New Orleans, La.
C. A. SEVERANCE.....St. Paul, Minn.
HUGH H. BROWN.....Tonopah, Nev.
JOHN T. RICHARDS.....Chicago, Ill.
JOHN B. CORLISS.....Detroit, Mich.
S. E. ELLSWORTH.....Jamestown, N. D.
WILLIAM BROSMITH.....Hartford, Conn.
THOMAS W. BLACKBURN.....Omaha, Neb.
THOMAS W. SHELTON.....Norfolk, Va.
A. T. STOVALL.....Okolona, Miss.